TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted].

No. [redacted] 71.

THE NOBLE STATE BANK, PLAINTIFF IN ERROR,

vs.

C. N. HASKELL, G. W. BELLAMY, J. P. CONDREN, J. A. BENEFIEL, M. E. TRAPP, AND H. R. GREEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED [redacted].

(21,340.)

(21,340.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 544.

THE NOBLE STATE BANK, PLAINTIFF IN ERROR,

vs.

C. N. HASKELL, G. W. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, AND H. H. SMOCK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS WASHINGTON, D. C., OCTOBER 7, 1908.

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1 UNITED STATES OF AMERICA, *ss:*

NOBLE STATE BANK, a Corporation, Plaintiff in Error,
vs.
C. N. HASKELL, G. E. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, and H. H. SMOCK, Defendants in Error.

Citation.

To the above named defendants in error, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the City of Washington, District of Columbia, thirty days from and after this 17th day of September, 1908, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Oklahoma, wherein you are defendants in error, and the Noble State Bank, a corporation, is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned should not be corrected, and speedy justice should not be done the parties in that behalf.

Witness the Honorable R. L. Williams, Chief Justice of the Supreme Court of the State of Oklahoma, this 17th day of September, 1908.

[Seal Supreme Court, State of Oklahoma.]

R. L. WILLIAMS,
Chief Justice.
W. H. L. CAMPBELL,
Clerk of the Supreme Court,
By W. M. BONNER, *Dep.*

We hereby acknowledge due service of the within Citation this 17th day of September, 1908.

CHAS. WEST,
Attorney General, Attorney for Defendants in Error.

2 [Endorsed:] Noble State Bank *vs.* C. N. Haskell *et al.* Citation and acceptance of service. Filed Sep. 17, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By ——, Deputy. Flynn & Ames, Attorneys-at-Law, Oklahoma City, Oklahoma.

3 Supreme Court of the State of Oklahoma.

THE NOBLE STATE BANK, a Corporation, Plaintiff in Error,
vs.
C. N. HASKELL, G. E. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, and H. H. SMOCK, Defendants in Error.

Clerk's Return to Writ of Error.

In obedience to the command of the within writ of error, I herewith transmit to the Supreme Court of the United States the duly

certified transcript of the record, the opinion and the proceedings of the within entitled cause, and all the things concerning the same.

In Witness Whereof I hereunto subscribe my name and affix the seal of the said Supreme Court of the State of Oklahoma, this 21st day of September, 1908.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By W. M. BONNER, *Dep.*

4 [Endorsed:] Cl'k's return. By —— Deputy. Flynn & Ames, Attorneys-at-Law, Oklahoma City, Oklahoma.

5 In the Supreme Court of the State of Oklahoma.

NOBLE STATE BANK, a Corporation, Plaintiff in Error,
vs.
C. N. HASKELL, G. W. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, and H. H. SMOCK, Defendants in Error.

Petition for Writ of Error.

The Noble State Bank, a corporation, the plaintiff in error in the above entitled cause, feeling aggrieved by the decision and judgment of the Court rendered therein on the 10th day of September, 1908, comes now Flynn & Ames and J. B. Dudley, its attorneys of record herein, and petitions the Court for an order allowing said plaintiff in error to prosecute a writ of error to the Honorable Supreme Court of the United States, under and according to the rules of the United States in that behalf made and provided, and for an order that all further proceedings herein be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States, and your petitioner will ever pray.

J. B. DUDLEY,
FLYNN & AMES,
Attorneys for Plaintiff in Error.

Endorsed on back: Noble State Bank *vs.* C. N. Haskell *et al.* Petition for Writ of Error. Filed Sep. 17, 1908. W. H. L. Campbell, Clerk of the Supreme Court, Flynn & Ames, Attorneys at law, Oklahoma City, Oklahoma.

6 In the Supreme Court of the United States of America.

THE NOBLE STATE BANK, a Corporation, Plaintiff in Error,
vs.
C. N. HASKELL, G. W. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, and H. H. SMOCK, Defendants in Error.

Assignment of Errors.

Comes now the Noble State Bank, plaintiff in error in the above entitled cause, and says that in the record and proceedings, in the above entitled cause, there is manifest error in this, to-wit:

1. The Supreme Court of the State of Oklahoma committed error in affirming the judgment of the District Court of Logan County, sustaining a demurrer to the petition of plaintiff and dismissing said petition.

2. The Supreme Court of the State of Oklahoma committed error in holding that the act of the Legislature of Oklahoma involved in said cause is valid and enforcible.

3. Said Supreme Court of the State of Oklahoma committed error in holding that the said Act of the Legislature of the State of Oklahoma was not in conflict with Section 10 of Article 1 of the Constitution of the United States, which provides that "no State shall * * * pass any * * * law impairing the obligation of contracts * * *"

4. Said Supreme Court of the State of Oklahoma committed error in holding that said Act of the Legislature of the State of Oklahoma was not in conflict with the Fourteenth Amendment
7 to the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

5. Said Supreme Court of the State of Oklahoma committed error in denying to the plaintiff in error the relief sought by its petition.

Wherefore, the said plaintiff in error prays that the judgment of the Supreme Court of the State of Oklahoma be reversed, and that judgment be rendered for plaintiff in error as prayed in its petition.

J. B. DUDLEY,
FLYNN & AMES,
Attorneys for Plaintiff in Error.

Endorsed on back: Noble State Bank *vs.* C. N. Haskell, *et al.* Assignment of Errors. Sep. 17, 1908. W. H. L. Campbell, Clerk of the Supreme Court. Flynn & Ames, Attorneys at law, Oklahoma City, Oklahoma.

8 In the Supreme Court of the State of Oklahoma.

THE NOBLE STATE BANK, a Corporation, Plaintiff in Error,

vs.

C. N. HASKELL, G. W. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, and H. H. SMOCK, Defendants in Error.

Order Allowing Writ of Error.

This cause coming on to be heard on the 17th day of September, 1908, upon petition of the Plaintiff in Error for a writ of error herein, and it appearing that the said plaintiff in error has filed its assignment of errors, it is hereby ordered, upon motion of C. B. Ames, one of the attorneys for plaintiff in error, that a writ of error,

be, and it is hereby allowed to have reviewed in the Supreme Court of the United States the judgment heretofore rendered in said cause on the 10th day of September, 1908.

And, it further appearing that said plaintiff in error has prayed for an order of supersedeas in said cause, it is further ordered that said plaintiff in error be required to execute its bond in said cause in the sum of Five Hundred Dollars, and that upon the filing of said bond and its approval by the Chief Justice of this Court, it is ordered that all further proceedings be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Ordered, adjudged and decreed this 17th day of September, 1908.

[SEAL.]

R. L. WILLIAMS,
Chief Justice of the Supreme Court of Oklahoma.
W. H. L. CAMPBELL,
Clerk Supreme Court,
By W. M. BONNER, *Dep.*

Endorsed on back: Noble State Bank *vs.* C. N. Haskell *et al.* Order Allowing Writ of Error. Filed Sep. 17, 1908, W. H. L. Campbell, Clerk of the Supreme Court. Flynn & Ames, Attorneys at Law. Oklahoma City, Oklahoma.

9 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, before you or some of you, by the highest Court of law or equity of the said State in which a decision could be had in the said suit between the said Noble State Bank, a corporation, and C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee, N. E. Trapp, and H. H. Smock, wherein was drawn in question the validity of a statute of, or an authority exercised under said State of Oklahoma, on the ground of their being repugnant to the Constitution of the United States, and the decision was against the title, right, privilege, specially set up or claimed under such clause of the Constitution, a manifest error has happened to the great damage of the Noble State Bank, a corporation, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same at Washington on the 17th day of October next in the said Supreme Court to be then and there held that the records and proceedings therein aforesaid be inspected; the Supreme Court may cause therein

to correct that error what of right and according to the laws
10 and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17 day of September, 1908.

[The Seal of the Circuit Court of the United States, Western District of Oklahoma.]

HARRY L. FINLEY,
Clerk of the Circuit Court of the United States for the Western District of Oklahoma.

Allowed by

R. L. WILLIAMS,
Chief Justice of the Supreme Court of the State of Oklahoma.

11 [Endorsed:] Noble State Bank *vs.* C. N. Haskell, *et al.* Writ of Error. Sep. 17, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By ——, Deputy. Flynn & Ames, Attorneys-at-Law, Oklahoma City, Oklahoma.

12 In the Supreme Court of the State of Oklahoma.

NOBLE STATE BANK, a Corporation, Plaintiff in Error,
vs.
C. N. HASKELL, G. W. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, and H. H. SMOCK, Defendants in Error.

Know all men by these presents:

That the Noble State Bank, a corporation, organized under the laws of Oklahoma, Principal Obligor, and J. W. McNeal and —— —— as sureties, are held and firmly bound unto C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee, M. E. Trapp, and H. H. Smock, in the penal sum of five hundred & no/100 Dollars, for the payment of which well and truly to be made we and each of us do hereby jointly and severally bind ourselves, our successors and assigns.

Dated this 17 day of September, 1908.

The condition of the foregoing obligation is such that Whereas, said obligees, did on the 10th day of September, 1908, in the above entitled cause procure a judgment against the Noble State Bank, affirming the previous decision of the District Court of Logan County, Oklahoma, dismissing the petition for an injunction filed by said plaintiff in Error; and,

Whereas, the said Noble State Bank has procured a writ of error to the Supreme Court of the United States to review the proceedings in said cause.

Now therefore if the said Noble State Bank, a corporation
13 shall prosecute its writ of error to effect, and pay all damages

and costs if it fails to make its plea good, then this obligation shall be void; otherwise to remain in full force and effect.

NOBLE STATE BANK,
Principal Obligor.
By FLYNN & AMES,
Its Attorneys.
J. W. McNEAL,
—— ——, *Sureties.*

The above bond is hereby approved this 17 day of September 1908.

R. L. WILLIAMS,
Chief Justice of the State of Oklahoma.

Endorsed on Back: Noble State Bank, *vs.* C. N. Haskell *et al.* Supersedeas Bond. Filed Sep. 17 1908. W. H. L. Campbell, Clerk of the Supreme Court. Flynn & Ames, Attorneys at Law, Oklahoma City, Oklahoma.

14 Filed Feb. 26, 1908. W. H. L. Campbell, Clerk Supreme Court.

In the Supreme Court of the State of Oklahoma.

NOBLE STATE BANK, a Corporation, Plaintiff in Error,
vs.
C. N. HASKELL, G. W. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, and H. H. SMOCK, Defendants in Error.

Petition in Error.

Comes the Noble State Bank, a corporation, plaintiff in error, in the above entitled cause, and respectfully complains of C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee, M. E. Trapp, and H. H. Smock, defendants in error in said cause, for that, heretofore, to-wit: on the 19th day of February, 1908, said defendants in error recovered a judgment in the district court of Logan County, Oklahoma, sustaining their demurrers to the petition of plaintiff in error and recovering judgment for costs against said plaintiff in error.

A case-made containing the pleadings and record and proceedings on which said judgment was rendered is hereto attached marked Exhibit A and referred to as a part of this petition.

Plaintiff in error avers that there was manifest error on the rendition of said judgment and the proceedings in said district court of Logan County, Oklahoma, in the following particulars, to-wit:

1. Said District Court of Logan County, Oklahoma, erred in sustaining the demurrer of the said defendants and each of them.

15 2. The said District Court erred in sustaining the demurrer of the said defendant C. N. Haskell.

3. The said District Court erred in sustaining the demurrer of the said defendant G. W. Bellamy.

4. The said District Court erred in sustaining the demurrer of the said defendant J. P. Connors.
5. The said District Court erred in sustaining the demurrer of the said defendant J. A. Menefee.
6. The said District Court erred in sustaining the demurrer of the said defendant M. E. Trapp.
7. The said District Court erred in sustaining the demurrer of the said H. H. Smock.
8. The said District Court erred in dismissing the petition of plaintiff.
9. The said District Court erred in rendering judgment against the said plaintiff for costs.

Wherefore, said plaintiff in error prays that said cause may be reversed and that judgment may be here rendered granting the plaintiff in error the injunction prayed for in its petition.

J. B. DUDLEY,
FLYNN & AMES,
Attorneys for Plaintiff in Error.

16 STATE OF OKLAHOMA,
Logan County, ss:

In the District Court in and for said County.

NOBLE STATE BANK, a Corporation, Plaintiffs,
vs.
C. N. HASKELL, G. W. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, and H. H. SMOCK, Defendants.

Filed Feb. 26, 1908.
W. H. L. CAMPBELL,
Clerk Supreme Court.

Case-made.

Be it remembered that on the 14th day of February, 1908, the above named plaintiff instituted this proceeding against the above named defendants by filing in the district court of Logan County, Oklahoma, its petition, which petition is in the words and figures following, to-wit:

Filed Feb. 26 1908.
C. H. GRISWOLD,
Clerk District Court.

17 STATE OF OKLAHOMA,
Logan County, ss:

In the District Court in and for said County.

NOBLE STATE BANK, a Corporation, Plaintiff,
vs.
C. N. HASKELL, G. W. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, and H. H. SMOCK, Defendants.

Petition.

Comes the plaintiff in the said cause and for its cause of action against the defendants states the following facts:

1.

That said plaintiff is a corporation organized under the laws of the Territory of Oklahoma.

2.

The defendant, C. N. Haskell, is the Governor of the State of Oklahoma, the defendant G. W. Bellamy is the Lieutenant Governor, the defendant J. P. Connors is the President of the State Board of Agriculture, the defendant J. A. Menefee is the State Treasurer, the defendant M. E. Trapp is the State Auditor and the defendant H. H. Smock is the Bank Commissioner of the State of Oklahoma.

3.

The said plaintiff is a banking corporation organized under the laws of the Territory of Oklahoma, with an authorized and paid up capital stock of Ten Thousand Dollars, and its articles of incorporation were filed in the office of the Secretary of the Territory of Oklahoma on the 23rd day of May, 1902, a copy of said articles of incorporation being hereto attached, marked "Exhibit A" and referred to as a part of this petition.

18 On said 23rd day of May, 1902, the Territory of Oklahoma issued to the said plaintiff a patent, a copy of which is hereunto attached, marked "Exhibit B" and referred to as a part of this petition, and on the 7th day of July, 1902, the Bank Commissioner of the Territory of Oklahoma issued to said plaintiff a certificate of authority, as required by the laws of said Territory, a copy of which is hereunto attached, marked "Exhibit C" and referred to as a part of this petition.

4.

That said plaintiff has continuously since the 23rd day of May, 1902, in the town of Noble, County of Cleveland, Oklahoma, been engaged in the business of banking, as authorized by law, and its authority by virtue of its articles of incorporation, patent and certificate of authority, and since the 16th day of November, 1907, said plaintiff, in the same place, has been engaged in the banking

business under and by virtue of the constitution and the laws of the State of Oklahoma.

5.

On the 17th day of December, 1907, the Governor of the State of Oklahoma approved an act which had previously been passed by the legislature of the State of Oklahoma entitled "An Act creating a State Banking Board, Establishing a Depositor's Guaranty Fund to insure Depositors Against Loss when the Bank becomes insolvent, Prescribing the qualifications of officers and Directors, Fixing the salary of Bank Commissioners and his assistants and providing for more Frequent Examinations. Fixing penalty for Embezzlement, limiting the amount of the Bank Funds that can be loaned to any one person, corporation or firm, Declaring an Emergency."

Section 1 of said act provides that "A state banking board is hereby created, to be composed of the Governor, Lieutenant Governor, President of the State Board of Agriculture, State Treasurer and State Auditor," and the said defendants, C. N. Haskell,
19 G. W. Bellamy, J. P. Connors, J. A. Menefee and M. E. Trapp, are, respectively, the Governor, Lieutenant Governor, the President of the State Board of Agriculture, the State Treasurer, and the State Auditor, and the said named defendants by virtue of said act constitute the State Banking Board, of the State of Oklahoma, and the said defendant H. H. Smock is the Bank Commissioner of the State of Oklahoma.

6.

By section 2 of said act it is provided that "Within sixty days after the passage and approval of this act, the State Banking Board shall levy against the Capital Stock an assessment of one per cent of the Banks' daily average deposits, less the deposits of the State Funds, properly secured for the proceeding year, upon each and every bank organized and existing under the laws of the State, for the purposes of creating a Depositors' Guaranty Fund. Said assessment shall be collected upon call of the State Banking Board. In one year from the time the first assessment is levied, and annually thereafter, each bank subject to the provisions of this act shall report to the bank commissioner the amount of its average daily deposits for the preceding year, and if said deposits are in excess of the amount upon which one per cent was previously paid, said report shall be accompanied by additional funds to equal one per cent of the said daily average excess of deposits, less the deposit of State funds properly secured and less the deposits of the National Government for the year over the preceding year, and each amount shall be added to the Depositors' Guaranty Fund. If the Depositors' Guaranty Fund is depleted from any cause, it shall be the duty of the State Banking Board in order to keep said fund to one per cent of the total deposits in all of the said banks subject to the provisions of this act, to levy a special assessment to cover such deficiency, which special assessment shall be levied upon the
20 Capital Stock of the banks subject to this act, according to the amount of their deposits as reported in the office of the

Bank Commissioner. And said special assessment shall become immediately due and payable."

And the plaintiff states that the said State Banking Board, acting under and pursuant to the pretended authority of said law, has levied an assessment against the capital stock of this plaintiff bank of one per cent of its daily average deposits during the preceding year, which said average deposits amounts to Thirty-three thousand one hundred and forty-seven dollars ($33,147.00), and that the said State Banking Board and the said Bank Commissioner, under and pursuant to said pretended law, purpose to compel this plaintiff to pay said one per cent of its daily average deposits for the preceding year for the purpose of creating said "Depositors' Guaranty Fund for the benefit of the depositors of all of the banks in said state upon which said law operates, and that the said defendants, unless restrained by this court, will force this plaintiff to pay said assessment as provided by said pretended law, a copy of the said notice of assessment served on plaintiff is hereto attached, marked "Exhibit D" and referred to as a part of this petition.

7.

Plaintiff further states that the said law under which the defendants are pretending to act is in conflict with and a violation of Section 2 of Article 2 of the Constitution of Oklahoma, which provides that "all persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry," and that said law deprives this plaintiff of the enjoyment of the gains of his own industry, for the benefit of the depositors of other banks in which plaintiff has no interest.

8.

Plaintiff further states that said pretended act is in con-
21 flict with and a violation of Section 7 of Article 2 of the Constitution of Oklahoma, which provides that "No person shall be deprived of life, liberty, or property, without due process of law," in that the said plaintiff is deprived of its property by virtue of said assessment without due process of law.

9.

Plaintiff further states that said proposed law is in conflict with and a violation of Section 15 of Article 2 of the Constitution of Oklahoma, which provides that "No bill of attainder, *ex post facto* law, nor any law impairing the obligations of contracts, shall ever be passed." in that said law violates the contract between this plaintiff and the State of Oklahoma, evidenced by its charter, patent, and certificate of authority, copies of which are hereunto attached as Exhibits "A," "B" and "C," to this petition.

10.

Plaintiff further states that said pretended law is in conflict with and a violation of section 23 of Article 2 of the Constitution of Oklahoma, which provides that "No private property shall be taken or

damaged for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining or sanitary purposes, in such manner as may be prescribed by law," in that the private property of this plaintiff is sought to be taken for private use, without compensation and against the consent of the plaintiff.

11.

Said pretended law is in conflict with and a violation of Section 24 of Article 2 of the Constitution of Oklahoma, which provides that "Private property shall not be taken or damaged for public use without just compensation," in that said law proposes to take the property of this plaintiff, and if it be held that said taking is a taking for public use, then said taking is without compensation and not in accordance with the form prescribed for the taking of private property for public use, as set out more fully in said Section 24.

12.

Said plaintiffs states that said pretended law is in conflict with and a violation of Section 57 of Article 5 of the Constitution of Oklahoma, which provides that "Every act of the legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes, and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length. Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof," in that said law

(1) Creates a State Banking Board ;
(2) Establishes a Depositors Guaranty Fund;
(3) Prescribes the qualifications of officers and directors;
(4) Fixes the salary of the Bank Commissioner;
(5) Fixes the penalty for embezzlement;
(6) And limits the amount of the bank's funds that can be loaned to any one person;

and expresses all of said six different purposes in the title thus avoiding the entire act.

13.

Plaintiff further states that if said pretended law shall be construed as levying a tax upon the property of plaintiff, that it is in conflict with and a violation of Section 8 of Article 10 of the Constitution of Oklahoma, which provides that "all property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale," in that

said law, if it levies that tax, does not assess it upon the basis
23 of the fair cash value of the property affected, but upon an arbitrary basis having no regard to the fair cash value of the property assessed.

14.

If said pretended law is construed as levying a tax then it is in conflict with and in violation of Section 9 of Article 10 of the Constitution of Oklahoma, which provides that, "Except as herein otherwise provided, the total taxes, on an ad valorem basis, for all purposes, State, county, township, city or town, and school district taxes, shall not exceed in any one year thirty-one and one-half mills on the dollar." In that said law, for said special and private purposes, if it be construed as levying a tax, levies a tax on this plaintiff of about 3.31 per cent. of the fair cash value of the property of plaintiff.

15.

If said pretended law shall be construed as levying a tax, then it is in conflict with and in violation of Section 14, of Article 10 of the Constitution of Oklahoma, which provides that "Taxes shall be levied and collected by general laws, and for public purposes only, except that taxes may be levied when necessary to carry into effect Section thirty-one of the Bill of Rights, in that said law, if it be construed as levying a tax, does not levy said tax for public but for private purposes.

16.

Plaintiff further states that said pretended law is in conflict with and in violation of Section 1 of Article 14 of the Constitution of Oklahoma, which provides that "General laws shall be enacted by the legislature providing for the creation of a Banking Department, to be under the control of a Bank Commissioner, who shall be appointed by the Governor for a term of four years, by and with the consent of the Senate, with sufficient power and authority to regulate and control all State Banks, Loan, Trust and Guaranty Companies, under laws which shall provide for the protection of depositors and individual stockholders," in that said pretended law does not
24 provide for the protection of the individual stockholders of this plaintiff.

17.

Plaintiff further states that said pretended law is in conflict with and in violation of Section 10 of Article 1 of the Constitution of the United States, which provides that "No state shall * * * pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts * * *" in that said law impairs the obligations of the contracts between the plaintiff and the state of Oklahoma, as evidenced by its articles of incorporation, patent, and certificate of authority copies of which are hereto attached as exhibits "A" "B" and "C."

18.

Plaintiff further states that said pretended law is in conflict with and a violation of that portion of the 14th Amendment to the Consti-

tution of the United States which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," in that said pretended act deprives this plaintiff of its property without due process of law and denies to it the equal protection of the laws.

19.

Wherefore plaintiff states that the said pretended act is null and void, because it is in conflict with the constitution of the State of Oklahoma, and the constitution of the United States, and that the said defendants, in acting under and enforcing the provisions of said pretended law, are wholly without right and have no jurisdiction to make levy or enforce the aforesaid assessment of one per cent. upon the average deposits of the plaintiff.

20.

Plaintiff further states that it is a solvent, growing concern, with its capital unimpaired, and perfectly able and willing to pay all its obligations to its depositors, and that it does not need and does not desire the assistance of any other bank or of the State of Oklahoma in discharging all of its obligations, and that it is fundamentally opposed to paying the debts of any other bank in the state of Oklahoma.

21.

Plaintiff further states that it has no adequate remedy at law to prevent the wrongs herein complained of, and that, unless the defendants are enjoined from enforcing the provisions of said law as against this plaintiff, it will be remediless.

Wherefore Plaintiff prays for a temporary injunction, restraining the said defendants and each of them from taking any further or other proceedings to levy against or collect the said assessment of one per cent. or any other assessment under said law against this plaintiff, and that on final hearing said temporary injunction may be made permanent and plaintiff prays for such other, further and general relief as to the wisdom of the court may seem proper.

J. B. DUDLEY,
FLYNN & AMES,
Attorneys for Plaintiff.

STATE OF OKLAHOMA,
Logan County, ss:

Before the undersigned, Clerk of the District Court in and for said county, personally appeared R. F. Ellinger, who, being by me duly sworn deposes and says that he is the President of Noble State Bank, the plaintiff in the above entitled cause, that he has read the above and foregoing petition, is familiar with the facts therein stated and the allegations therein contained and that said facts and allegations are true.

R. F. ELLINGER.

Subscribed and sworn to before me this 14th day of February. 1908.

[SEAL.] C. H. GRISWOLD,
District Clerk.

Filed Feb. 26 1908
W. H. L. CAMPBELL,
Clerk Supreme Court.

27 EXHIBIT "A."

GUTHRIE, OKLAHOMA, *February 11th*, 1908.

I hereby certify that the within typewritten pages are true and correct copies of the Articles of Incorporation and the Certificate of the Increase of the Capital Stock of the Noble State Bank, as the same appear of record and are on file in this office, both instruments being recorded in Corporation Record Number Two.

[SEAL.] BILL CROSS,
Secretary of State.

28 *Articles of Incorporation of Noble State Bank, Noble, Oklahoma.*

Be it known, that the undersigned, Citizens of the Territory — Oklahoma, do hereby voluntarily associate ourselves together for the purpose of forming a private corporation under the laws of the Territory of Oklahoma and do hereby certify

First.

That the name of this corporation shall be Noble State Bank.

Second.

That the purposes for which this corporation is formed is to conduct a general banking business.

Third.

That the place where its principal business is to be transacted is at Noble, Oklahoma.

Fourth.

That the term for which this corporation is to exist is Twenty Years (20).

Fifth.

The number of Directors or Trustees of this Corporation, and the names and residences of such of them who are to serve until the election of such officers and their qualifications.

R. F. Ellinger, Stillwater, Oklahoma.
John W. Morris, Stillwater, Oklahoma.
C. F. Wantland, Noble, Oklahoma.
G. F. Graham, Noble, Oklahoma.

29 Sixth.

That the estimated value of the goods, chattels, lands, rights, and credits owned by the Corporation is Five Thousand Dollars ($5000.00).

That the amount of the Capital stock shall be Five Thousand ($5000.00) Dollars and shall be divided into Fifty (50) shares of $100.00 Dollars each.

In testimony whereof, We have hereunto subscribed our names this 22nd day of May, A. D. 1902.

R. F. ELLINGER.	$3000.00
JOHN W. MORRIS.	500.00
C. F. GRAHAM.	300.00
J. A. WHITEHEAD.	100.00
ISAAC GRAHAM.	300.00
C. F. WANTLAND.	300.00
R. W. YEARGIN.	200.00
his THOMAS x STANDIFER. mark	300.00

ISAAC GRAHAM,
Witness to Mark.

TERRITORY OF OKLAHOMA,
Noble County, ss:

Personally appeared before me, a notary public in and for said county, Territory above named, H. F. Ellinger, John W. Morris, G. F. Graham, J. A. Whitehead, Isaac Graham, C. F. Wantland, R. W. Yeargin, Thos. Standifer, who are personally known to me to be the same persons who executed the foregoing instrument of writing and duly acknowledged the execution of the same.

In testimony whereof, I have hereunto subscribed my name and affixed my Notarial Seal, this 22 day of May, 1902.

[SEAL.] J. M. MURPHY,
Notary Public.

My commission expires Aug. 28, 1905.

30 This is to certify that on the 6th day of September, 1902, there was subscribed and paid an increase of $5000.00 to the capital Stock of the Noble State Bank, of Noble, Oklah., and that the Capital Stock of said bank is now $10,000.00 fully paid.

R. F. ELLINGER, *President.*

R. F. Ellinger, of lawful age, being duly sworn, upon his oath says that the above statement subscribed to by him is true and correct.

[SEAL.] JOHN W. MORRIS,
Notary Public.

My commission expires July 12, 1906.

31 EXHIBIT "B."

Patent.

Territory of Oklahoma to all to whom these presents shall come, Greeting:

Whereas, A. F. Ellinger, and John W. Morris of Stillwater, O. T. C. F. Wantland, and G. F. Graham, of Noble, O. T., have filed in the office of the Secretary of the Territory of Oklahoma certain articles of organization with a view of forming a corporation to be known as Noble State Bank and with a capital of Five Thousand Dollars for the purpose of conducting a general banking business, under the laws of the Territory of Oklahoma, to exist for a period of Twenty years, with principal place of business at Noble, Oklahoma, and having complied with the provisions of the Statutes in such cases made and provided.

Therefore, The Territory of Oklahoma hereby grants unto the above named persons and their associates, successors and assigns, full authority, by and under the said name of Noble State Bank, to exercise the powers and privileges of a corporation, for the purpose above stated and in accordance with their said articles of organization and the laws of this Territory.

In witness whereof, These presents have been attested with the Great Seal, and signed by the Secretary of the Territory of Oklahoma, at Guthrie, the 23rd day of May in the year One Thousand Nine Hundred and Two.

[SEAL.]

WILLIAM GRIMES.
Secretary of Oklahoma Territory.

32 EXHIBIT "C."

TERRITORY OF OKLAHOMA:

Certificate of Authority.

Banking Department.

OFFICE OF TERRITORIAL BANK COMMISSIONER.

It is hereby certified, That the Noble State Bank, a corporation organized under the laws of the Territory of Oklahoma, whose place of business is at Noble, in the Territory of Oklahoma, has been duly organized and its capital paid in as required by law.

Therefore, The said Corporation is hereby authorized to transact a General Banking Business within the said Territory of Oklahoma, subject to the several provisions and requirements of the said laws, until the twenty-third day of May, in the year of our Lord, Nineteen Hundred *Twenty-Two.*

In Testimony Whereof, I, Paul F. Cooper, Territorial Bank Commissioner of Oklahoma Territory, have hereunto set my hand and

affixed my seal of office at the City of Guthrie, the day and year above written.

[SEAL.]

PAUL F. COOPER,
Territorial Bank Commissioner.

33 EXHIBIT "D."

Lieutenant Governor Geo. W. Bellamy, Chairman Roy C. Oakes, Secretary.

Members of State Banking Board.

Charles N. Haskell, Governor.
J. P. Connors, Chairman Board of Agr'l.
J. A. Menefee, State Treasurer.
M. E. Trapp, State Auditor.

State Banking Board.

State of Oklahoma.

GUTHRIE, OKLA., *Feb.* 11, 1908.

Noble State Bank, Noble, Oklahoma.

GENTLEMEN: The assessment under the Depositors' Guaranty Act of the Legislature, will be made on Friday, February 14th, 1908. At that time the State Banking Board will decide what proportionment of said assessment will be called.

You should have your check here on that day for 50 per cent. of your assessment.

Your average deposits for the year 1907 is $33,147.00.

Fifty per cent. of your assessment would be $165.73.

Your certificate will be sent you in time so that you should receive it not later than Monday, February 17th, 1908, provided that your check is here by Friday, February 14th, 1908, and the Bank Commissioner approves your bank.

Respectfully, ROY C. OAKES, *Secretary.*

34 Endorsed: Filed Feb. 14, 1908. C. H. Griswold, Clerk District Court.

35 Thereafter, on the 17 day of February, 1908, the said defendant C. N. Haskell filed his demurrer in said cause, which demurrer is in the words and figures following, to-wit:

36 STATE OF OKLAHOMA,
County of Logan:

In the District Court, *ss.*

NOBLE STATE BANK, a Corporation, Plaintiff,
vs.
C. N. HASKELL ET AL., Defendants.

Demurrer of C. N. Haskell to Pet.

Come now the defendant C. N. Haskell, Governor of the State of Oklahoma, and demurs to the petition of the plaintiff for cause appearing on the face thereof as follows:

1. That the Court has no jurisdiction of the person of this defendant.
2. That the Court has no jurisdiction of the subject of the action.
3. That the petition does not state facts sufficient to constitute a cause of action against the defendant.

C. N. HASKELL, *Governor.*
CHAS. WEST,
Att'y Gen., and
FIELDING LEWIS,
As't Att'y Gen.

Endorsed: Filed Feb. 17, 1908. C. H. Griswold, Clerk, by W. T. Warren, Deputy.

37 Thereafter, on the 19th day of February, 1908, the said defendant G. W. Bellamy filed his demurrer to the petition of plaintiff in said cause, which said demurrer is in the words and figures following, towit:

38 STATE OF OKLAHOMA,
County of Logan, ss:

In the District Court.

NOBLE STATE BANK, Plaintiff,
vs.
C. N. HASKELL ET AL., Defendants.

Separate Demurrer of Geo. W. Bellamy.

Comes now Chas. West, Attorney General for the State of Oklahoma, appearing for Geo. W. Bellamy as Lieutenant Governor, and demurs to the petition herein for defects appearing on the face thereof, as follows, to-wit:

First. That the Court has no jurisdiction of the person of the defendant.

Second. That the court has no jurisdiction of the subject of the action.

Third. That the petition does not state facts sufficient to constitute a cause of action against this defendant.

CHAS. WEST,
Attorney General.
FIELDING LEWIS,
Ass't Att'y General.

Filed Feby. 19, 1908.
C. H. GRISWOLD, *Clerk.*

39 Thereafter, on the 19th day of February, 1908, the said defendant, J. P. Connors, filed his demurrer to the petition of plaintiff in said cause, which said demurrer is in the words and figures following, to-wit:

40 STATE OF OKLAHOMA,
County of Logan, ss:

In the District Court.

NOBLE STATE BANK, Plaintiff,
vs.
C. N. HASKELL ET AL., Defendants.

Separate Demurrer of J. P. Connors.

Comes now Chas. West, Attorney General for the State of Oklahoma appearing for J. P. Connors as Chairman of the Board of Agriculture, and demurs to the petition herein for defects appearing on the face thereof, as follows, to-wit:

First. That the Court has no jurisdiction of the person of the defendant.

Second. That the court has no jurisdiction of the subject of the action.

Third. That the petition does not state facts sufficient to constitute a cause of action against this defendant.

CHAS. WEST,
Attorney General.
FIELDING LEWIS,
Ass't Att'y General.

Endorsed: Filed Feby. 19, 1908. C. H. Griswold, Clerk.

41 Thereafter, on the 19th day of February, 1908, the said defendant J. A. Menefee filed his demurrer to the petition in said cause, which said demurrer is in the words and figures following, to-wit:

42 STATE OF OKLAHOMA,
County of Logan, ss:

In the District Court.

NOBLE STATE BANK, Plaintiff,
vs.
C. N. HASKELL ET AL., Defendants.

Separate Demurrer of J. A. Menefee.

Comes now Chas. West, Attorney General for the State of Oklahoma appearing for J. A. Menefee as State Treasurer, and demurs to the petition herein for defects appearing on the face thereof, as follows, to-wit:

First. That the Court has no jurisdiction of the person of the defendant.

Second. That the court has no jurisdiction of the subject of the action.

Third. That the petition does not state facts sufficient to constitute a cause of action against this defendant.

CHAS. WEST,
Attorney General.
FIELDING LEWIS,
Ass't Att'y General.

Endorsed: Filed Feby. 19, 1908, C. H. Griswold, Clerk.

43 Thereafter, on the 19th day of February, 1908, the said defendant M. E. Trapp filed his demurrer to the petition of plaintiff in said cause, which said demurrer is in the words and figures following to-wit:

44 STATE OF OKLAHOMA,
County of Logan, ss:

In the District Court.

NOBLE STATE BANK, Plaintiff,
vs.
C. N. HASKELL ET AL., Defendants.

Separate Demurrer of M. E. Trapp.

Comes now Chas. West, Attorney General for the State of Oklahoma, appearing for M. E. Trapp, as State Auditor, and demurs to the petition herein for defects appearing on the face thereof, as follows, to-wit:

First. That the Court has no jurisdiction of the person of the defendant.

Second. That the court has no jurisdiction of the subject of the action.

Third. That the petition does not state facts sufficient to constitute a cause of action against this defendant.

CHAS. WEST,
Attorney General.
FIELDING LEWIS,
Ass't Att'y General.

Filed Feby. 19, 1908.
C. H. GRISWOLD, *Clerk.*

45 Thereafter on the 19th day of February, 1908, the said defendant H. H. Smock filed his demurrer to the petition of the plaintiff in said cause, which said demurrer is in the words and figures following, to-wit:

46 STATE OF OKLAHOMA,
County of Logan, ss:

In the District Court.

NOBLE STATE BANK, Plaintiff,
vs.
C. N. HASKELL ET AL., Defendants.

Separate Demurrer of H. H. Smock.

Comes now Chas. West, Attorney General for the State of Oklahoma, appearing for H. H. Smock as Bank Commissioner, and demurs to the petition herein for defects appearing on the face thereof, as follows, to-wit:

First. That the court has no jurisdiction of the person of the defendant.

Second. That the Court has no jurisdiction of the subject of the action.

Third. That the petition does not state facts sufficient to constitute a cause of action against this defendant.

CHAS. WEST,
Attorney General.
FIELDING LEWIS,
Ass't Att'y General.

Endorsed: Filed Feb'y 19, 1908. C. H. Griswold, Clerk.

47 Thereafter, to-wit: on the 19th day of February, 1908, said cause came on for final hearing in the said District Court of Logan County, upon the demurrers of said defendants to the petition of said plaintiff and the court rendered judgment sustaining said demurrers according to the terms of the journal entry in said cause, which was filed on said day and which is in the words and figures following, to-wit:

48 Filed Feb. 26, 1908. W. H. L. Campbell, Clerk Supreme Court.

STATE OF OKLAHOMA,
County of Logan, ss:

In the District Court.

NOBLE STATE BANK, Plaintiff,
vs.
C. N. HASKELL ET AL., Defendants.

Journal Entry.

On this 19th day of February, 1908, the same being one of the regular judicial days of the January 1908 term of said Court, the plaintiff appearing by Flynn & Ames, its attorneys, and defendants appearing by Chas. West, Attorney General and Fielding Lewis, Assistant Attorney General, the separate demurrers of the defendants to the petition came on to be heard after being considered are by the court sustained as to the third ground thereof to which the plaintiff at the time excepted, and the plaintiff thereupon elected to stand upon his petition and refused to plead further.

And it is by the Court therefore considered, ordered and adjudged that this cause be dismissed, and that the defendants have judgment against the plaintiff for their costs herein to which the plaintiff at the time excepted.

And thereupon the plaintiff was given ten days to prepare and serve a case made for appeal to the Supreme Court, and defendants to have five days thereafter in which to suggest amendments thereto, the case made to be signed and settled upon one day's notice by either party.

Ordered, adjudged and decreed in open court on the aforesaid.

A. H. HUSTON, *Judge.*

O. K.
CHAS. WEST, *Att'y Gen.*
O. K.
C. B. AMES.

Endorsed: Filed Feb'y 19, 1908. C. H. Griswold, Clerk.

49 On the same day the court filed its opinion in said cause, which said opinion is in the words and figures following, to-wit:

50 Filed Feb. 26, 1908. W. H. L. Campbell, Clerk Supreme Court.

By the COURT:

In the case that was argued day before yesterday, State Bank of Noble *v.* C. N. Haskell and other state officers constituting the Bank-

ing board, and H. H. Smock, Bank Commissioner, I have given the arguments and authorities cited as much consideration as possible in the time at my disposal. I had given no consideration to the question involved before hand, but the arguments were very thorough and exhaustive, and to say the least, on both sides were an intellectual treat.

The case was heard upon an application for an injunction to restrain the Banking Board and the Bank Commissioner from levying and collecting the assessment to create a safety or insurance fund as provided by the *law* banking law. The Attorney General has filed a demurrer to the petition of the plaintiff, based upon three grounds first, that the court has no jurisdiction over the Governor; second, that the court has no jurisdiction over the subject matter, and third, that the facts stated in the petition do not constitute a cause of action.

As to the first ground of demurrer, it is argued that the Governor as the chief executive of the state, is not subject to the orders or mandates of any court, and that the three branches of the government, the legislative, executive and the judicial, are equal and co-ordinate, and that one cannot interfere with the other. It is true that the three branches of Government are equal and co-ordinate, but it is not correct to say that they are wholly independent of each other. They in fact are, and are intended to operate in many ways, as a check, one upon the other, the legislature may pass laws of which a court may disapprove, and the court is bound to give them effect notwithstanding. But when the legislature transcends its constitutional limitations and passes an unconstitutional law, the court may, and
51 it is its duty, to so declare, and hold such a law void. So too, the Governor, as the head of the executive power of the State, may exercise all of his discretionary powers without let or hindrance, from either of the other branches, but still he can only act under the law.

In our system of Government, no one is above the law, and the chief executive himself must be bound by it the same as the humblest citizen, and I think that he is bound by such an interpretation of the law as is placed upon it by the Courts.

Ordinarily, a case that involves so serious a question as the constitutionality of a law, must eventually be passed upon by the court of last resort of a state. It might be argued that the Governor and all of his advisers, including the highest law officer of the state, might have as good or better an opportunity to know the correct interpretation to place upon a law that a *nisi prius* court, but such court of course can only exercise its best judgment and that judgment is subject to supervision by the highest court, and its judgment must prevail, even though it be in conflict with the interpretation placed upon it by any of the executive officers of the State.

The Attorney General states frankly that there are decisions both ways upon this question, that some courts hold that the governor may be controlled by the courts, and others that he may not. This court would, therefore, feel warranted in following those decisions that appear to me the most reasonable.

It is argued by counsel for plaintiff that if the Governor could not be so controlled, also that no other member of the board of which he was one member, could be controlled because he could not be, that the courts must be powerless to check any action on the part of the legislature, no matter how far it might transcend the constitutional limitations, if the legislature would merely provide for the enforcement of such enactments by placing its en-
52 forcement in the hands of a board of which the Governor was made a member. The logic of this argument seems to be unanswerable. I am not prepared to say that the Governor, even in the exercise of a purely ministerial duty, cannot be controlled by the courts*m* and that therefore no other member of the board of which he is one, can be controlled either.

As to the second ground of demurrer, that the court has no jurisdiction of the subject matter, I take it that the Attorney General means that the plaintiff has not brought himself by his allegations within the scope of equitable relief that is, he argues that the plaintiff does not show that such a wrong is about to be perpetrated upon him as will entitle him to equitable relief, that it does not fairly allege that the assessment has been made, and that they are about to take his money; that if the law is void, it would be a good defence in *quo warranto* proceedings if such a one was brought to forfeit his charter as provided in the new banking law; that it does not allege that they are about to forfeit his charter, nor that the Bank Commissioner or the Banking Board is about to take his money. The notice of the assessment is set up as an exhibit and controls the pleadings. It is true that this exhibit, which is dated February 11, does not state directly that the assessment has been made, but states that it will be made on the 14th of February, but it also fixes the amount that the plaintiff is required to pay, which is one-half of one per cent of his average yearly deposits; it alleges further that the defendants are about to compel him to pay this sum into the hands of the State Treasurer. I am inclined to think that this is a sufficient allegation, certainly so if there is no adequate remedy at law, to entitle the plaintiff to the relief sought, if the defendants have no authority or right to compel him to pay this money.

This brings us down to the main question in the case, the third ground of demurrer, namely, that the facts stated are not sufficient to constitute a cause of action, and this, in my judgment,
53 depends on the constitutionality of the new banking law. It is urged by the plaintiff that this law violates in many particulars both the constitution of the State of Oklahoma and the Constitution of the United States as well. That it is violative of that provision of the constitution which provides that every one shall enjoy the gains of his own industry, and also that it is a taking of private property without due process of law; that it is an impairment of the obligations of a contract, the contract between the State and the plaintiff corporation by which it was originally chartered; that if it be held it is the taking of private property for a public use, that it is taking it without just compensation, which the Constitution forbids; that if it be held it is the taking

of private property for private use, that it cannot be done at all. It is urged further that if the assessment be considered as a tax, that it cannot be sustained, first, because the money that is gathered is not to be used for governmental purposes, and second, that it is largely in excess of ad valorem taxation, allowed under the constitution.

It is pointed out that there are only three ways under which the goverament can take the property of the citizen, namely, by taxation, by the exercise of eminent domain, and third, by the exercise of the police powers. It is not legitimate taxation, and it is not claimed that it is an exercise of the right of eminent domain, and I think that this controversy must necessarily be narrowed down to the question as to whether or not it is a proper exercise of the police power of the State. Counsel for the plaintiff argues ably that it cannot come under this head, that the police power can only be applied to the protection of the public health and safety, and many cases are cited where, under the peculiar facts of each case, it has been held by our highest courts, that certain laws were unconstitutional because they provide for the taking of private property for a private use. The case that originated in Topeka, where the municipality of the city, acting upon a majority vote of the citizens, issued one hundred thousand dollars' worth of bonds to be given as a bonus to a bridge company for locating there, is relied
54 upon. Mr. Justice Miller of the Supreme Court of the United States in a very strong opinion, pointed out that there were some things that even the people or a majority of them could not do, that this was true in the very nature of things; that even the people themselves, being sovereign, still they could not by any act, take from the minority their private property and devote it to the use of some other private person. I think this must appeal to every one. But there was no question but that was exactly what was sought to be done, and neither is there any question of police power in the case.

The "Grasshopper" case, decided by Judge Brewer, is another case where it was sought to *make* the people of certain townsites in order to raise a fund to loan to the suffering farmers. It perhaps was a popular measure and one that might have resulted in great good, but it was a clear case of taking private property for private use, and there was no semblance to the exercise of police power in so doing.

This is also true of the Massachusetts case, where the city of Boston was authorized by the legislature to bond the city for 20 million dollars in order to raise a fund to loan to the owners of real estate whose buildings had been destroyed by the great fire. It was a clear case of taking private property by taxation to use, not to carry on the government, but to loan to individuals, the taking of private property for private use, and neither was there any question of police power in that.

The Maryland case, counsel contends, is this case. In that case, as I recollect it, a county, or the state, was authorized to issue bonds to an insolvent railroad corporation in order to enable it to pay its

debts to the citizens. That was also the taking of private property for private use, and there was no question of regulating it involved.

55 Using these cases as a predicate, counsel for plaintiff argues that since this fund that is sought to be raised by the assessment complained of, for the purpose of paying the debts, that is, debts to depositors of any bank that may hereafter become insolvent, that the state might just as well provide for paying the debts of any other corporation, of railroad corporations, of gas companies, of electric light companies and of any other company engaged in private business, but upon the other hand, as is pointed out by the Attorney General, the state will regulate all of these corporations, not to the extent of paying their debts, but to the extent of protecting the public in the transaction of the particular business in which they are engaged; that is, it will see that the public can travel over the railroads with safety; it will regulate the stringing and laying of wires, and the laying of pipes systematically and in proper places, so as to protect the public from harm, and also will regulate the charges of such corporations. But Bankers are not engaged in transporting passengers or freight, nor in transmitting electric currents, nor gas; their *entire business* upon one side of the ledger is in *taking the people's money* on deposit. Has the legislature the right, under the police power, to regulate this business? Can the legislature provide rules and regulations for the protection of these deposits and those who make them? Under the law, I am of the opinion that only corporations, banking corporations, can engage in the business of banking in this state, and individuals cannot. The banking corporations therefore have a monopoly of the banking business. This is given to them by the law. Enjoying this monopoly that is given them, must they not be subject to all the rules and regulations reasonably imposed upon them by the law? And does not these regulations apply both to those corporations who have been chartered heretofore—before the late law went into effect,—as well as those who may be chartered hereafter?

56 That is a condition upon which the banking corporations heretofore chartered may continue to do business.

My conclusion is that the provision of this law for raising a safety fund to protect all depositors of state banks is a legitimate exercise of the police power of the state, and that the law does not infringe any of the provisions of the Constitution of Oklahoma nor of the Constitution of the United States.

As to the General policy or wisdom of the law, the courts have nothing to do,—those are matters that must rest alone with the legislature, subject to the approval of the Governor.

Endorsed: Filed Feb'y 19, 1908, C. H. Griswold, Clerk.

57 STATE OF OKLAHOMA,
County of Logan, ss:

In the District Court Thereof.

I, C. H. Griswold, Clerk of the District Court in and for Logan County, State of Oklahoma, do hereby certify that the above and foregoing is a true, full and complete copy of all the pleadings and proceedings in the above entitled cause, as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at the City of Guthrie, in said County and State, this 21st day of February, A. D. 1908.

C. H. GRISWOLD,
Clerk District Court, Logan County, State of Oklahoma.

Filed Feb. 26, 1908.
W. H. L. CAMPBELL,
Clerk Supreme Court.

58 The undersigned attorneys for plaintiff, do hereby certify that the foregoing contains a true, complete and correct copy of the petition of the plaintiff, the separate demurrers of the defendants and the judgment of the court, and all the proceedings in said cause on which the judgment of the court was rendered, and we do hereby certify that the same is a full, true and complete case made.

J. B. DUDLEY,
FLYNN & AMES,
Attorneys for Plaintiff.

Filed Feb. 26, 1908.
W. H. L. CAMPBELL,
Clerk Supreme Court.

59 We do hereby certify that the above and foregoing case made was duly served on us on this 26 day of February, 1908.

CHAS. WEST, *Att'y Gen., and*
FIELDING LEWIS, *Ass't Att'y Gen.,*
Attorneys for Defendants.

Filed Feb. 26, 1908.
W. H. L. CAMPBELL,
Clerk Supreme Court.

The undersigned, attorneys for defendants in said cause, do hereby consent that the foregoing case made be signed and settled without notice to us and we do hereby agree that the same is a full, true, complete and correct case made in said cause and we do hereby waive the issuance and service of summons in error.

CHAS. WEST, *Atty' Gen., and*
FIELDING LEWIS, *Ass't Att'y Gen.,*
Attorneys for Defendants.

Filed Feb. 26, 1908.
W. H. L. CAMPBELL,
Clerk Supreme Court.

60 STATE OF OKLAHOMA,
Noble County, ss:

In the District Court in and for said County.

NOBLE STATE BANK, a Corporation, Plaintiff,
vs.
C. H. HASKELL, G. W. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, and H. H. SMOCK, Defendants.

Certificate of Trial Judge.

This is to certify that the foregoing case made and the amendments thereto have been duly served in due time, and the same duly submitted to me for settlement and signing as required by law, by the parties to said cause; that the same, as above set forth and as corrected by me, is true and correct, and contains a true and correct statement of all pleadings, orders, findings, proceedings and judgments had in said cause, all the orders and rulings made and exceptions noted, and all of the record upon which the judgment and journal entry in said cause was made; and I hereby settle, allow, certify and sign the same as true and correct, and hereby order that the clerk of the district Court attest the same with the seal of said court and file same of record.

Witness my hand at Guthrie, Oklahoma, this 26th day of February, 1908.

[SEAL.]

A. H. HUSTON,
District Judge.

Attest:

C. H. GRISWOLD,
Clerk District Court.

Filed Feb. 26, 1908.

W. H. L. CAMPBELL,
Clerk Supreme Court.

Endorsed on back: #83. Filed Feb. 26, 1908. W. H. L. Campbell, Clerk Supreme Court. Flynn & Ames, Attorneys-at-Law, Oklahoma City, Okla.

61 Thereafter, to-wit: on the 2nd day of March, 1908, being the forty-eighth judicial day of said Supreme Court, the following amongst other proceedings were had, to-wit:

Supreme Court, November Term, 1907, March 2, 1908, Forty-Eighth Judicial Day.

#83.

NOBLE STATE BANK, a Corporation, Plaintiff in Error,
vs.
C. N. HASKELL ET AL., Defendants in Error.

Order.

This cause coming on to be heard Monday,, the 2nd day of March, 1908, upon motion of Plaintiff in Error and defendants in error for advancement, and the same being considered by the court, said motion is granted and said cause is set for hearing on the 13 day of April, 1908, and the plaintiff in error is allowed two weeks in which to file briefs and defendants in error three weeks thereafter in which to file briefs.

Order of the Judge decreed in open court on the day first named.

O. K.
F. & A.

62 Thereafter, to-wit: on the 13th day of April, 1908, being the sixty-fourth judicial day of said Supreme Court, the following amongst other proceedings were had, to-wit:

Supreme Court, November Term, 1907, April 13, 1908, Sixty-Fourth Judicial Day.

#83.

NOBLE STATE BANK, a Corporation, Plaintiff in Error,
vs.
C. N. HASKELL ET AL., Defendants in Error.

Ordered by the Court, that this cause be and the same is hereby continued till May 13, 1908.

63 Thereafter, to-wit: on the 15th day of May, 1908, being the fourth judicial Day of said Supreme Court, the following amongst other proceedings were had, to-wit:

Supreme Court, May Term, 1908, May 15, 1908, Fourth Judicial Day.

#83.

NOBLE STATE BANK, a Corporation, Plaintiff in Error,
vs.
C. N. HASKELL ET AL., Defendants in Error.

And now oral argument is had herein, and cause is submitted on the record, briefs and oral argument.

64 Thereafter on the 10th day of September, 1908, being the third judicial day of said Supreme Court, the following amongst other proceedings were had, to-wit:

Supreme Court, September Term, 1908, September 10th, 1908, Third Judicial Day.

#83.

NOBLE STATE BANK, a Corporation, Plaintiff in Error,
vs.
C. N. HASKELL ET AL., Defendants in Error.

And now this cause comes on for final decision and determination by the court, upon the record and briefs submitted herein.

And the Court having duly considered the same and being fully advised in the premises, finds: that the judgment of the lower court in the above cause, should be affirmed.

It is therefore, ordered and adjudged by the Court, that the judgment of the lower court, in the above cause, be, and the same is hereby affirmed.

Opinion by Williams, C. J. All the Justices concur.

65 Filed Sep. 11, 1908. W. H. L. Campbell, Clerk of the Supreme Court, by —— ——, Deputy.

In the Supreme Court of the State of Oklahoma.

No. 83.

NOBLE STATE BANK, Plaintiff in Error,
vs.
C. N. HASKELL ET AL., Defendants in Error.

Syllabus by the Court.

1. The act "Creating a State Banking Board, establishing a Depositors' Guaranty Fund to insure depositors against loss when the bank becomes insolvent," etc., of December 17, 1907, as amended on February 12, 1908, is not in conflict with section 7, article 2, (Bunn's Ed. sec. 16), of the constitution, which provides that "No person shall be deprived of life, liberty, or property, without due process of law."
2. Same. Nor is it in violation of section 15, article 2, (Bunn's Ed. sec. 24), of the constitution, which provides that "No law impairing the obligation of contracts shall ever be passed."
3. Same. Nor is it in violation of section 2, article 2, (Bunn's Ed. sec 11), of the constitution, which provides that "All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry."

4. Same. Nor is it in violation of section 23, article 2, (Bunn's Ed. sec. 32), of the constitution, which provides that "No private property shall be taken or damaged for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining or sanitary purposes, in such manner as may be prescribed by law."
5. Same. Nor is it in violation of section 24, article 2, (Bunn's Ed. sec. 33), of the constitution, which provides that "Private property shall not be taken or damaged for public use without just compensation."
6. Title. Nor is said act embracing the provision relative to the establishment of the Depositors' Guaranty Fund to secure depositors against loss when the bank becomes insolvent, invalid on account of section 57, article 5, (Bunn's Ed. sec. 130), of the constitution, which provides that "Every act of the legislature shall embrace but one subject, which shall be clearly expressed in its title, except * * *; Provided, that if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof."
7. When the brief of the plaintiff in error, in any civil cause, fails to preserve, by specification of error, any point complained of in the lower court, such question is thereby waived in this court.
66 8. Where the probative allegations to not aver that the injury apprehended is irreparable, and the Chancellor denies an application for a temporary injunction, on review in this court the action of the lower court will not be reversed.

Error from the District Court of Logan County.

A. H. Huston, Judge.

J. B. Dudley and Flynn & Ames, for plaintiff in error.
Charles West, Attorney General, for defendants in error.

Affirmed.

Statement of Facts.

This is a proceeding by plaintiff in error, as plaintiff, seeking to reverse the judgment of the district court sustaining the demurrers of the defendants in error, as defendants, in the lower court to plaintiff's petition. The constitutionality of an act of the legislature of this state creating a depositors' guaranty fund is involved. The petition, omitting the caption and exhibits, is as follows:

"Comes the plaintiff in said cause and for its cause of action against the defendants states the following facts: 1. The said plaintiff is a corporation organized under the laws of the territory of Oklahoma. 2. The defendant, C. N. Haskell, is the Governor of the state of Oklahoma, the defendant, G. W. Bellamy, is the Lieutenant

Governor, the defendant, J. P. Connors, is the President of the State Board of Agriculture, the defendant, J. A. Menefee, is the State Treasurer, the defendant, M. E. Trapp, is the State Auditor, and the defendant, H. H. Smock, is the Bank Commissioner of the state of Oklahoma. 3. The said plaintiff is a banking corporation organized under the laws of the territory of Oklahoma, with an authorized and paid up capital stock of ten thousand dollars, and its articles of incorporation were filed in the office of the Secretary of the territory of Oklahoma on the 23rd day of May, 1902, a copy of said articles of incorperation being hereto attached, marked 'Exhibit A' and referred to as a part of this petition. On said 23rd day of May, 1902, the territory of Oklahoma issued to said plaintiff a patent, a copy of which is hereto attached, marked 'Exhibit B', and referred to as a part of this petition, and on the 7th day of July, 1902, the Bank Commissioner of the territory of Oklahoma issued to said plaintiff a certificate of authority, as required by the laws of said territory, a copy of which is hereunto attached, marked 'Exhibit C' and referred to as a part of this petition. 4. The said plaintiff has continuously since the 23rd day of May, 1902, in the town of Noble, county of Cleveland, Oklahoma, been engaged in the business of banking, as authorized by law, and is authority by virtue of its articles of incorporation, patent and certificate of authority, and since the 15th day of November, 1907, said plaintiff, in the same place, has been engaged in the banking business under and by virtue of the
67 constitution and laws of the state of Oklahoma. 5. On the 17th day of December, 1907, the Governor of the state of Oklahoma approved an act which had previously been passed by the legislature of the state of Oklahoma entitled 'An Act creating a State Banking Board, Establishing a Depositors' Guaranty Fund to insure Depositors against loss when the bank becomes insolvent, prescribing the qualifications of officers and directors, fixing the salary of Bank Commissioner and his assistants and providing for more frequenet examinations, fixing the penalty for embezzlement, limiting the amount of the Banking Funds that can be loaned to any one person, corporation or firm, declaring an emergency.' Section 1 of said act provides that 'A state banking board is hereby created, to be composed of the Governor, the lieutenant Governor, President of the State Board of Agriculture, State Treasurer and the State Auditor,' and the defendants, C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee and M. E. Trapp, are, respectively, the Governor, Lieutenant Governor, the President of the State Board of Agriculture, the State Treasurer, and the State Auditor, and the said named defendants by virtue of said act constitute the State Banking Board of the state of Oklahoma, and the said defendant, H. H. Smock, is the Bank Commissioner of the state of Oklahoma. 6. By section 2 of said act it is provided that 'Within sixty days after the passage and approval of this act, the State Banking Board shall levy against the capital stock an assessment of one per cent. of the bank's daily average deposits, less the deposits of the state funds, properly secured for the preceding year, upon each and every bank organized and existing under the laws of the state, for the purpose of creating

a Depositors' Guaranty Fund. Said assessment shall be collected upon call of the State Banking Board. In one year from the time the first assessment is levied, and annually thereafter, each bank subject to the provisions of this act shall report to the bank commissioner the amount of its average daily deposits for the preceding year, and if said deposits are in excess of the amount upon which the one per cent. was previously paid, said report shall be accompanied by additional funds to equal one per cent. of the said daily average excess of deposits, less the deposits of the state funds properly secured, and less the deposits of the National Government for the year over the preceding year, and each amount shall be added to the Depositors' Guaranty Fund. If the Depositors' Guaranty Fund is depleted from any cause, it shall be the duty of the State Banking Board in order to keep said fund to one per cent. of the total deposits in all of the said banks subject to the provisions of this act, to levy a special assessment to cover such deficiency, which special assessment shall be levied upon the capital stock of the banks subject to this act, according to the amount of their deposits as reported in the office of the Bank Commissioner. And said special assessment shall become immediately due and payable.' And the plaintiff states that the said State Banking Board, acting under and pursuant to the pretended authority of said law, has levied an assessment against the capital stock of this plaintiff bank of one per cent. of its daily average deposits during the preceding year, which said average deposit amounts to thirty-three thousand one hundred and forty-seven dollars ($33,147.00), and that the said State Banking Board and the said Bank Commissioner under and pursuant to said pretended law, proposes to compel this plaintiff to pay said one per cent. of its daily average deposits for the preceding year for the purpose of creating said Depositors' Guaranty Fund for the
68 benefit of the depositors of all the banks in said state upon which said law operates, and that the said defendants, unless restrained by this court, will force this plaintiff to pay said assessment as provided by said pretended law, a copy of the said notice of assessment served on plaintiff is hereto attached, marked 'Exhibit D' and referred to as a part of this petition. 7. Plaintiff further states that the said law under which the defendants are pretending to act is in conflict with and a violation of Section 2 of Article 2 of the Constitution of Oklahoma, which provides that 'all persons have the inherent right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry,' in that said law deprives this plaintiff of the enjoyment of the gains of its own industry, for the benefit of the depositors of other banks in which plaintiff has no interest. 8. Plaintiff further states that said pretended act is in conflict with and a violation of Section 7 of Article 2 of the Constitution of Oklahoma, which provides that 'No person shall be deprived of life, liberty or property, without due process of law,' in that the said plaintiff is deprived of its property by virtue of said assessment without due process of law. 9. Plaintiff further states that said pretended law is in conflict with and a violation of Section 15 of Article 2 of the Constitution of Oklahoma, which pro-

vides that 'No bill of attainder, *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be passed,' in that said law violates the contract between this plaintiff and the state of Oklahoma, evidenced by its charter, patent, and certificate of authority, copies of which are hereunto attached as Exhibits 'A', 'B', and 'C' to this petition. 10. Plaintiff further states that said pretended law is in conflict with and a violation of Section 23 of Article 2 of the Constitution of Oklahoma, which provides that 'No private property shall be taken or damaged for private ——, with or without compensation, unless by the consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining or sanitary purposes, in such manner as may be prescribed by law,' in that the private property of this plaintiff is sought to be taken for private use, without compensation and against the consent of the plaintiff. 11. Said pretended law is in conflict with and a violation of Section 24 of Article 2 of the Constitution of Oklahoma, which provides that 'Private property shall not be taken or damaged for public use without just compensation,' in that said law proposes to take the property of this plaintiff and if it be held that said taking is a taking for public use, then said taking is without compensation and not in accordance with the form prescribed for the taking of private property for public use, as set out more fully in said section 24. 12. Said plaintiff states that said pretended law is in conflict with and a violation of Section 57 of Article 5 of of the Constitution of Oklahoma, which provides that 'Every act of the legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of the statutes, and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length. Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may
69 not be expressed in the title thereof,' in that said law, (1) creates a state banking board; (2) establishes a Depositors' Guaranty Fund; (3) prescribed the qualifications of officers and directors; (4) fixes the salary of the Bank Commissioner; (5) fixes the penalty for embezzlement; (6) and limits the amount of the bank's funds that can be loaned to any one person; and expresses all of said six different purposes in the title, thus avoiding the entire act. 13. Plaintiff further states that if said pretended law should be construed as levying a tax upon the property of plaintiff, that it is in conflict with and a violation of Section 8 of Article 10 of the Constitution of Oklahoma, which provides that 'All property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale,' in that said law, if it levies a tax does not assess it upon the basis of the fair cash value of the property affected, but upon an arbitrary basis having no regard to the fair cash value of the property assessed. 14. If said pretended law is construed as levying a tax, then it is in conflict with and a violation of Section 9 of Article 10 of the

Constitution of Oklahoma, which provides that, 'Except as herein otherwise provided, the total taxes, on an ad valorem basis, for all purposes, state, county, township, city or town, and school district taxes shall not exceed in any one year thirty-one and one-half mills on the dollar,' in that said law, for said special and private purpose, if it be construed as levying a tax, levies a tax on this plaintiff of about 3.31 per cent. of the fair cash value of the property of the plaintiff. 15. If said pretended law shall be construed as levying a tax, then it is in conflict with and a violation of Section 14 of Article 10 of the Constitution of Oklahoma, which provides that 'Taxes shall be levied and collected by general laws, and for public purposes only, except that taxes may be levied when necessary to carry into effect section thirty-one of the Bill of Rights', in that said law, if it be construed as levying a tax, does not levy said tax for public use but for private purposes. 16. Plaintiff further states that said pretended law is in conflict with and a violation of Section 1 of Article 14 of the Constitution of Oklahoma, which provides that 'General laws shall be enacted by the legislature providing for the creation of a banking department, to be under the control of a Bank Commissioner, who shall be appointed by the Governor for a term of four years, by and with the consent of the Senate, with sufficient power and authority to regulate and control all state banks, loan, trust, and guaranty companies, under laws which shall provide for the protection of depositors and individual stockholders,' in that said pretended law does not provide for the protection of the individual stockholders of this plaintiff. 17. Plaintiff further states that said pretended law is in conflict with and a violation of Section 10 of Article 1 of the constitution of the United States, which provides that 'No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts * * *' in that said law impairs the obligation of the contract between the plaintiff and the state of Oklahoma, as evidenced by its articles of incorporation, patent, and certificate of authority, copies of which are hereto attached as Exhibits 'A', 'B' and 'C'. 18. Plaintiff further states that said pretended law is in conflict with and a violation of that portion of the 14th amendment to the Constitution of the United States which provides that 'No state shall make any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' in that said pretended act deprives this plaintiff of its property without due process of law and denies to it the equal protection of the laws. 19. Wherefore, plaintiff states that the said pretended act is null and void, because of its conflict with the constitution of the state of Oklahoma and the Constitution of the United States, and that the said defendants, in acting under and enforcing the provisions of said pretended law, are wholly without right and have no jurisdiction to make, levy or enforce the aforesaid assessment of one per cent. upon the average deposits of the plaintiff. 20. Plaintiff further states that it is a solvent going concern, with its capital unimpaired and

perfectly able and willing to pay all its obligations to its depositors, and that it does not need and does not desire the assistance of any other bank or of the state of Oklahoma. 21. Plaintiff further states that it has no adequate remedy at law to prevent the wrongs herein complained of, and that, unless the defendants are enjoined from enforcing the provisions of said law as against this plaintiff, it will be remediless. Wherefore, plaintiff prays for a temporary injunction, restraining the said defendants and each of them, from taking any further or other proceedings to levy against or collect the said assessment of one per cent, or any other assessment under said law against this plaintiff, and that on final hearing said temporary injunction may be made permanent, and plaintiff prays for such other, further and general relief as to the wisdom of the court may seem proper."

In the court below C. N. Haskell, as Governor of the state, demurred to plaintiff's petition on the following grounds: 1. That the court had no jurisdiction of the person of the said defendant. 2. That the court had no jurisdiction of the subject of the action. 3. That the petition did not state facts sufficient to constitute a cause of action against said defendants.

The other defendants, George W. Bellamy, as Lieutenant Governor, J. P. Connors, as chairman of the Board of Agriculture, J. A. Menefee, as State Treasurer, M. E. Trapp, as State Auditor, and H. H. Smock, as Bank Commissioner, interposed similar demurrers.

On the 19th day of February, A. D., 1908, each of the separate demurrers of the defendants to plaintiff's petition were sustained in the lower court as to the third ground therein set out. The plain-
71 tiff, duly saving its exceptions, elected to stand upon its petition, and refused to plead further, and judgment was rendered in favor of said defendants. Thereupon, plaintiff was allowed ten days to prepare and serve a case made, and defendants five days thereafter within which to suggest amendments thereto. Thereafter, on the 26th day of February, A. D., 1908, said case made and the amendments thereto having been served in due time, and duly submitted for settlement and signing by the parties thereto, the same were duly certified to by the trial judge, and this cause is now properly before this court for review.

Plaintiff is a banking corporation, chartered under the laws of the territory of Oklahoma on the 23rd day of May, A. D. 1902, with a capital stock of five thousand dollars, and afterwards, on the 6th day of September, A. D., 1902, its capital stock was increased to the sum of ten thousand dollars.

Opinion of the court by WILLIAMS, *C. J.*:

Plaintiff in error contends that the carrying into effect of what is known as the Depositors' Guaranty Law will impair its charter contractual rights. Section 2 of the act of December 17, 1907, establishing the Depositors' Guaranty Fund, etc., provides as follows:

"Within sixty days after the passage and approval of this act, the state banking board shall levy against the capital stock an assessment of one per cent. of the bank's daily average deposits, less the deposits

of the state funds, properly secured for the preceding year, upon each and every bank organized and existing under the laws of the state, for the purpose of creating a depositors' guaranty fund. Said assessment shall be collected upon call of the state banking board. In one year from the time the first assessment is levied, and annually thereafter, each bank subject to the provisions of this act shall report to the bank commissioner the amount of its daily average deposits for the preceding year, and if said deposits are in excess of the amount upon which one per cent. was previously paid, said report shall be accompanied by additional funds to equal one per cent. of the said daily average excess of deposits, less the deposits of
72 the state funds properly secured, and less the deposits of the National Government, for the year over the preceding year, and each amount shall be added to the depositors' guaranty fund. If the depositors' guaranty fund is depleted from any cause, it shall be the duty of the state banking board in order to keep said fund to one per cent. of the total deposits in all of said banks subject to the provisions of this act, to levy a special assessment to cover such deficiency, which special assessment shall be levied upon the capital stock of the banks subject to this act, according to the amount of their deposits as reported in the office of the bank commissioner. And said special assessment shall become immediately due and payable."

The wisdom of the framers of the Federal constitution, in providing that no state shall pass any law "impairing the obligation of contracts," can not be overestimated. The state, as a worthy exemplar of the people residing therein, should deal with absolute honesty with every citizen. *The progress and prosperity of civilized communities necessarily rests upon the sacredness of contracts.* Confidence in contractual relations being a safeguard against fluctuation and chaotic conditions in business affairs, permanent advancement must depend upon the certainty of obligations. The faith of man in the business integrity of his fellow men, *relized*, is the fountain of development, trade and commerce. The preservation of contracts lawfully entered into gives stability, not only to the present, but assurance for the future. Strike down the safeguards against contracts, and society can not advance. Unquestioned faith in their fulfillment elevates not only communities, but individuals. But when an individual, or association of individuals, deals with the sovereign power in acquiring corporate privileges or franchises, and the sovereignty reserves the right to alter, amend, annul, revoke, or repeal such grant, whenever in the opinion of the proper representative of such sovereignty such grant may be injurious to the citizenship thereof, it is obvious that when such occasion arises the legislature should
73 so act.

The question of the right of the legislature to repeal a granting act was first before the Supreme Court of the United States in the year 1805, in the case of Fletcher *vs.* Peck, 6 Cranch (U. S.), 135, where the legislature of the state of Georgia had rescinded an act authorizing the sale of certain state lands to individuals, where it was charged that such act was procured through fraud. The land

having passed into the hands of purchasers for valuable consideration, without notice, the court held that the state of Georgia was restrained, either by general principles which are common to free institutions, or by the particular provisions of the constitution of the United States, from afterwards passing a law whereby the estate of the *bona fide* purchasers of the premises could be constitutionally and legally impaired, and rendered null and void.

The next case was that of the trustees of Dartmouth College *vs.* Woodward, 4 Wheat. 520, 4 L. Ed. 630, in the year 1819. Mr. Chief Justice Marshall, in an elaborate opinion, held that the charter granted by the British Crown to the trustees of Dartmouth College in New Hampshire in the year 1769, was a contract "within the meaning of that clause of the Constitution of the United States, (art. 1, sec. 10), which declares that no state shall make any law impairing the obligation of contracts"; and further held the act of the state legislature of New Hampshire altering the charter without the consent of the corporation, in a material respect, to be an act impairing the obligation of the charter, and unconstitutional and void. The rule announced in this case has been uniformly adhered to in that court. However, the Supreme Court of the United States has, without exception, held that whenever the legislature granting a
74 charter reserves the right to alter, amend, modify, or repeal it, either by so providing by general law, whether organic or statutory, or in the charter, the right to amend or repeal such charter exists, and to do so does not impair the obligation of a contract, the charter being obtained and accepted with the full understanding that the right to amend, modify, or repeal, is a part of the contract, and to the exercise of which right the grantee had consented.

Immediately after the Dartmouth College case the importance of reserving the right to control corporate organizations, which were from time to time being chartered, was realized, and in many states general statutes expressly reserving such powers, which statutes became a part of every act of incorporation as fully as if written therein, unless a different purpose was therein plainly expressed, were enacted. And afterwards, in most of the states as their constitutions were revised, and in the new states as they were admitted into the union, such provisions were incorporated in the organic law.

On the 20th day of December, A. D., 1824, the legislature of New Jersey incorporated the "New Jersey Protection & Lombard Bank", which corporation was authorized to loan money upon real estate, public stock, or private property, to insure against loss or damage, by fire or water, and to issue bills of credit, etc. It was expressly provided in said act that it should be lawful for the legislature at any time to alter, amend, or repeal the same. This was one of the first acts passed after the decision in the Dartmouth College case where such reservation was made. Afterwards, on the 23rd day of November, 1825, the legislature repealed the act of incorporation, and appointed trustees and authorized them to administer and wind up the affairs of said corporation, under the direction of
75 the court of chancery. Afterwards, on the 10th day of December, 1825, the legislature passed a supplementary act,

with the preamble reciting that doubts had arisen touching the powers and duties of the trustees, and that it was the intention of the repealing act to preserve uninjured and unimpaired all the then existing rights and responsibilities, whether in favor of or against said bank, and then enacting and declaring that the trustees were, and from the time of the passage of the repealing act, should be deemed and taken to have been vested as the trustees for the creditors of said bank, and the stockholders existing at the time of the act of repeal, etc. In the case of McLaren *vs.* Pennington, 1 Paige, N. Y.), 109, the chancellor, in construing said charter and the repealing acts, said:

"The power of repealing the bank charter was therefore legally and constitutionally reserved to the legislature of New Jersey, and this court will not presume that it has been improperly or unconscientiously exercised."

In the case of DeCamp *vs.* Eveland, 19 Barb., 89, the court said:

"This legislative power is the very highest attribute of sovereignty, and its depositary the embodiment and concentration of the whole political force of the body politic, with such restraint only as the charter of government has imposed. It is the law-making power, and, as heretofore remarked, superior to either of the other departments of government. The legislature are nowhere restrained, directed, or limited in regard to the nature, grade, or character of evidence which they must have as the basis of their action, or to guide them in their decisions. In some specific cases their power is limited, and in others conditional, dependent upon the existence of certain facts. But they must necessarily decide whether such fact exists. Their general power to prescribe and regulate evidence for every other tribunal in the state has never been questioned, and it would present a singular anomaly if they were wanting in power to do the same for themselves, or to alter and change the same at pleasure; and it would be equally strange if any judicial tribunal in the state were permitted to review their decision upon the question of fact, on the existence of which their power to legislate in a particular case is made to depend. If such a thing were to be tolerated, it is not perceived why the existence of the fact in question may not, and in many cases must not, be proper to be submitted to a jury. It is believed that but few would be bold enough to contend for a principle pregnant with such absurd results."

76 In the year 1838 the legislature of New York passed what was known as the "General Banking Act," wherein it was provided that corporators or shareholders might stipulate in their charter that they should not be liable individually for the debts of the bank; but said act also contained a provision that the legislature might at any time alter or repeal same. In 1846 a change was made in the constitution of the state, which imposed individual liability on the stockholders of banks, and in 1849 a statute was passed providing for proceedings to enforce that responsibility. In the case of Sherman *vs.* Smith, 1 Black (U. S.), 590, Mr. Justice Nelson, speaking for the court, said:

"One of the articles of association, as we have already seen, pro-

vided that the shareholders should not be liable in their individual capacities for any contract, debt, &c. The 32nd section of the general banking act provided that 'the legislature may at any time alter or repeal this act.' The argument on the part of the plaintiff is, that this stipulation of the stockholders in the articles of association from exemption from all personal liability for the debts of the institution, constitutes a contract within the authority of the act under which it was organized, that can not be legally impaired by the provision in the constitution of New York, or by the act of 1849, which seeks to change the obligation, and impose upon them personal liability; that, in respect to this bank, the provision in the constitution and the law are void as against the constitution of the United States.

Now, in the first place, it is to be observed, that the article of association relied on is but an affirmation of the principles contained in the 23rd section of the act of 1838, and can be entitled to no greater effect or operation than the law itself, unless, indeed, by incorporating it into the articles it can be made permanent or perpetual. The section expressly exempts the individual liability of the stockholders, but confers the privilege upon the association to subject him to personal liability if they think fit. It was competent for the stockholders to avail themselves of this privilege in their articles of association, and thus, perhaps, increase public confidence in the credit of the institution. But we can discover no authority in the section or any necessity or propriety on the part of the association, for incorporating the law itself into their articles. Certainly in so doing they can not change it, or make it more or less effectual * * * Now, the 32nd section, which reserved to the legislature the power to alter or repeal the act, by necessary construction, reserved the power to alter or repeal all or any of these terms and conditions, or rules of liability, prescribed in the act. The articles of association are dependent upon, and become a part of, the law under which the
77 bank was organized, and subject to alteration or repeal, the same as any other part of the general system."

See also, Attorney General *vs.* North American Life Insurance Co., 82 N. Y. 187; Lee's Bank of Buffalo, 21 N. Y. 11; Reciprocity Bank, 22 N. Y. 9; Plank Road Co. *vs.* Thatcher, 11 N. Y. 102; Buffalo & New York City Railroad Co., 14 N. Y. 336; Empire Bank, 18 N. Y. 199.

In the year 1831 the legislature of Maine passed an act containing the following provision:

"All acts of incorporation which shall be passed after the passage of this act, shall at all times hereafter be liable to be amended, altered or repealed, at the pleasure of the legislature, in the same manner as if an express provision to that effect was therein contained, unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary."

In the year 1877, in the case of Railroad Co. *vs.* Maine, 96 U. S. 507, 24 L. Ed. 836, Mr. Justice Field, in construing this provision, said:

"By the reservation in the law of 1831, which is to be considered as if embodied in that act, the state retained the power to alter it in

all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges and immunities."

In the year 1831, the legislature of Massachusetts passed a measure to the effect that every act of incorporation which should thereafter be passed, should at all times be subject to amendment, alteration, or repeal at the pleasure of the legislature, provided that no act of incorporation should be repealed unless for violation of its charter, or other default, when such charter shall contain an express provision limiting the duration of the same. In the case of Crease *vs.* Babcock, *et* al., 23 Mass. 343, Morton, Judge, speaking for the court, in construing this provision, said:

"Had the proviso to this section been omitted, this charter might have been amended, altered, or repealed, 'at the pleasure of the legislature;' but the defendants' counsel argue that the proviso not
78 only restricts the power to repeal, but entirely takes it away, because the inquiry whether the bank has violated its charter or committed any default, is a judicial act, and therefore can not constitutionally be performed by the legislature. The effect of this argument is to raise the banks above the control of the legislature, and place them and all corporations with limited charters upon a different basis from other corporations.

All acts of incorporation are supposed to be granted with a view to the public wellfare, as well as to promote private interest and individual enterprise, and therefore it is to be presumed that the *pegislature*, when charters are holden at their pleasure, will not repeal them capriciously, nor without due inquiry into all the facts, and satisfactory evidence that they have ceased or failed to accomplish the objects for which they were established. In such case, the exercise of the reserved power to repeal could not be vitiated or invalidated, because the legislature investigated the case to see whether it was reasonable to exercise the power before they actually repealed a charter.

The true question is whether the legislature can in any case repeal an act of incorporation granted for a term of years. Any charter may be forfeited by a violation or for other sufficient cause; and on a proper process a judgment of forfeiture might be decreed. But this would be a judicial act, and might be done without the concurrence, and against the will of the legislature. It is entirely independent of and unconnected with the power to repeal. But the legislature clearly intended to reserve the power to discontinue corporations, not only for violation of their charters, but also for other defaults; which must mean, if anything, some acts short of violations, but which were inconsistent with, if not subsersive of the ends for which the corporation was established.

They reserve the power to repeal at pleasure, provided that on certain charters they will not exercise it, unless the corporations have committed some default. If a default has been committed, then, by the express terms of the compact, they have a right to exercise the power. They have exercised it, and therefore by the courtesy and confidence which is due from one department of the government to another, we are bound to presume that the contingency, upon which

the right to exercise it depended, has happened. Nor is the objection that the legislature had no power to inquire into the existence of the contingency valid. If any man or body of men is vested with power to do a certain act upon the occurrence of a certain event, when the event happens they have a right to perform the act, and the most that can be urged against it is that if it be exercised before the event happens, it is void. And this is true by whomsoever the fact is to be ascertained.

But we do not believe that the inquiry into the affairs or defaults of a corporation, with a view to continue or discontinue it, is a judicial act. No issue is formed. No decree or judgment is passed. No forfeiture is adjudged. No fine or punishment is imposed. But an inquiry is had in such form as is deemed most wise and expedient, with a view to ascertain the facts upon which to exert legislative power; or to learn whether a contingency has happened upon which the legislative action is required.

This is the constant and necessary course of proceeding, not only in relation to private and special acts, but also to many public acts. In granting new charters, or enlarging, modifying or renewing old ones, and in a large portion of ordinary legislation it is the
79 duty of the legislature to inquire and ascertain whether existing facts render their action expedient or necessary. These proceedings, though they wear some resemblance to, and have in view the same general object, the ascertainment of truth, yet in no proper sense can they be called judicial acts.

It is indispensible that this inquiry should, in the first instance, be made by the legislature. No other body can do it for them. They have restricted themselves from exercising the power of repeal until a certain event happens. This they must necessarily ascertain before they can properly exercise the power. Their decision must, *prima facie*, be presumed to be right. Whether it be conclusive or not, is a question which it is not necessary now to determine."

In the case of Greenwood *vs.* Freight Co., 105 U. S. 14, 15 Otto, 14, 26 L. Ed. 961, wherein this Massachusetts statute is construed, Mr. Justice Miller, speaking for the court, said:

"It was, therefore, in the power of the Massachusetts legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same grounds previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case. It may well be supposed, if answer were required to the complainant's bill, that it was made to appear that the Marginal Company had shown its incapacity to fulfill the objects for which it was created, and that another corporation, embracing larger area, connecting with more freight depots and wharves, and with more capital, could better serve the public in the matter for which both franchises were given."

In the year 1841, the General Assembly of South Carolina enacted the following:

"It shall become part of the charter of every corporation which shall, at the present, or any succeeding session of the general assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting the charter, renewal, amendment, or modification shall, in express terms, except it), that every charter of incorporation granted, renewed, or modified as aforesaid, shall at all times remain subject to amendment, alteration, or repeal by the legislative authority."

In the case of Hoge *vs.* Railroad Co., 99 U. S. 353, 9 Otto, 353, 25 L. Ed. 304, Mr. Justice Field, speaking for the court, said:

"By the law of 1841 every charter of a corporation in
80 South Carolina subsequently granted, amended or modified was subject to repeal, amendment, or modification by the legislature; unless specially excepted from such legislative control in the act granting the charter, amendment, or modification. Such is evidently the meaning of the forty-first section of that law, though the intention is inaptly expressed. This construction is somewhat different from that placed upon it in Tomlinson *v.* Jessup, reported in 15th Wallace, and gives the legislature a more extended control. But it is the construction to which a more careful examination of the language has led us. By it the legislature said that subsequent charters should be subject to repeal or amendment, unless they are in express terms excepted from its control in the acts granting them; and that existing charters, if subsequently amended or modified should stand in the same position. Its conditions constituted the condition upon which every charter was afterwards granted, amended, or modified. They formed as much a part of the new or amended charter as if they had been originally embraced in it. They did not of course operate as a limitation upon the power of the succeeding legislatures so as to control any repugnant legislation, but so long as they remained unrepealed, subsequent legislation, not repugnant in its terms, was to be construed and enforced in accordance with them."

The legislature of Kentucky, in the year 1846, provided that:

"All charters and grants of power to corporations or amendments thereto thereafter enacted or granted, and all other statutes, should be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst the privileges and franchises so granted are subject to amendment or repeal, no amendment or repeal shall impair other rights previously vested."

In the case of Louisville Water Co. *vs.* Clark, 143 U. S. 1, 12, 36 L. Ed. 55, Mr. Justice Harlan, speaking for the court, said:

"In short, the immunity from taxation granted by the act of 1882, was accompanied with the condition—expressed in the act of 1856, and made a part of every subsequent statute, when not otherwise expressly declared—that, by amendment or repeal of the former act, such immunity could be withdrawn. Any other interpretation

of the act of 1856 would render it inoperative for the purpose which, manifestly, it was enacted."

Article 4, section 31, of the constitution of California, 1849, provides as follows:

"Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this state concerning corporations, and all laws which may hereafter be passed pursuant to this section, may be altered from time to time, or repealed."

81 In the case of Spring Valley Water Works Co. *vs.* Schottler, 110 U. S. 348, 28 L. Ed. 176, Mr. Chief Justice Waite, delivering the opinion of the court, said:

"But it is argued that as the laws in force before 1858, for the formation of water companies, which provided for fixing the rates by the municipal authorities, were not accepted by the Spring Valley Company, and that of 1858, without such a provision, was, it is to be inferred, that the state contracted with this company not to subject it to the judgment of such authorities in a manner so vital to its interests. If the question was one of construction only, this argument might have force, but the dispute now is as to legislative power, not legislative action. The constitution of California, adopted in 1849, prohibited one legislature from bargaining away the power of succeeding legislatures to control the administration of the affairs of a private corporation formed under the laws of the state. Of this legislative disability the Spring Valley Company had notice, when it accepted the privileges of the act of 1858, and it must be presumed to have built its works and expended its moneys in the hope that neither a succeeding legislature, nor the people in their collective capacity when framing a constitution, would ever deem it expedient to return to the old mode of fixing rates, rather than on any want of power to do so, if found desirable. The question here is not between the buyer and the seller as to prices, but between the state and one of its corporations as to what corporate privileges have been granted. The power to amend corporate charters is no doubt one that bad men may abuse, but when the amendments are within the scope of the power, the courts can not interfere with the discretion of the legislatures that have been vested with authority to make them."

Section 1082 of the code of the state of Georgia, which came into force on the first day of January, 1863, provided:

"In all acts of private charters hereafter granted the state reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

In the case of Railroad Co. *vs.* Georgia, 98 U. S. 365, 8 Otto, 365, 25 L. Ed. 185, Mr. Justice Strong, speaking for the court, said:

"No such right was negatived in the charter granted to the plaintiff in error. Consequently the franchise was held subject to a power in the state to withdraw it, and subject to be changed, modified, or destroyed at the will of its grantor or creator. These provisions of the code became, in substance, a part of the charter."

Article 1, section 2, of the constitution of Ohio, 1851, provides:

82 "No special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly."

In the case of Hamilton Gas Light Co. *vs.* Hamilton City, 146 U. S. 270, 36 L. Ed. 963, Mr. Justice Harlan, speaking for the court, said:

"If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of law, of supplying gas light to the city of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion that such a grant, as respects, at least, its exclusive character, was subject to the power of the legislature, reserved by the state constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privilege, can not be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation affected by it. The corporation by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation."

The constitution of the state of Pennsylvania, adopted in 1857, provided as follows:

"The legislature shall have power to alter, revoke, or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever, in their opinion, it may be injurious to the citizens of the commonwealth; in such manner, however, that no injustice shall be done to the corporators."

In the Pennsylvania College Cases, 13 Wall. 213, 20 L. Ed. 550, Mr. Justice Clifford, delivering the opinion of the court, said:

"Cases often arise where the legislature, in granting an act of incorporation for a private purpose, either make the duration of the charter conditional, or reserve to the state the power to alter, modify or repeal the same at pleasure. When such a provision is incorporated in the charter it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power can not be regarded as an act within the prohibition of the constitution. Such a power also, that is the power to alter, modify, or repeal an act
83 of incorporation, is frequently reserved to the state by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation and that the charter was granted subsequent to the passage of the general law, even through the charter contained no such condition, nor any allusion to such a reservation. Reservations in such a charter, it is

admitted, may be made, and it is also conceded that where they exist the exercise of the power reserved by a subsequent legislature does not impair the obligation of the contract created by the original act of incorporation. Subsequent legislation altering or modifying the provisions of such a charter, where there is no such reservation, is certainly unauthorized if it is prejudical to the rights of the corporators, and was passed without their consent, but the converse of the proposition is also true, that if the new provisions altering and modifying the charter were passed with the assent of the corporation and they were duly accepted by a corporate vote as amendments to the original charter they can not be regarded as impairing the obligation of the contract created by the original charter. Private charters or such as are granted for the private benefit of the corporators are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature or its benefits diminished or impaired without the assent of the corporators than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or in some general law of the state which was in operation at the time the charter was granted."

In the case of Matthews *vs.* Board of Corporation Commissioners, 97 Fed. 404, Simonton, Circuit Judge, said:

"If, then, it be admitted that this right to regulate rate charges was a part of the charter of this company, and is as if it were repeated in *ipsissmis verbis*, it was subject to the control of the general assembly, and could be altered or repealed at its pleasure. This being so, the act creating the corporation commission, and giving it the right to regulate the rates of railroads, is an alteration of, and a repeal *pro tanto* of, this charter. Railroad Co. *vs.* Pendleton, 156, U. S. 667, 15 Sup. Ct. 413; Hoge *vs.* Railroad Co. 99 U. S. 348; Railroad Co. *vs.* Gibbes, 142 U. S. 390, 12 Sup. Ct. 255; New York & N. E. R. Co. *vs.* Town of Bristol, 151 U. S. 556, 14 Sup. Ct. 437. This action upon the part of the state does not impair the obligation of a contract."

Under the territorial government of Iowa a charter was granted to the Miners' Bank, the 23rd section of which provided as follows:

"That if said corporation shall fail to go into operation, or shall abuse or misuse their privileges under this charter, it shall be in the power of the legislative assembly of the territory to annul, vacate, and make void this charter."

84 Prior to the admission of the state into the Union the territorial legislature repealed the act chartering said bank. In the case of Miners' Bank of Dubuque *vs.* United States, 1 Ia. 561 (1 Greene, 561), a case which was pending in the territorial Supreme Court, transferred to the state Supreme Court on the admission of the state into the Union, Mr. Chief Justice Hastings, speaking for the court, said:

"It is to be presumed that the original grantees believed that no legislative assembly would ever exercise the power of repeal until the contingencies contemplated had happened. Such was the con-

fidence reposed in the good faith which the legislative assembly is presumed always to exercise towards the rights of the citizens, and it is to be regretted that the plaintiffs in error should have had their confidence so shaken as to feel themselves authorized to spread upon the records of the court facts, if true, which would involve the members of the legislature in the deepest turpitude and corruption. The plaintiffs propose to prove that when the act of repeal was passed, the bank had never misused or abused its privileges, and did not fail to go into operation. However legitimate it might have been for plaintiffs in error to prove such facts, before the legislature and its committee, they are now forever estopped by a solemn decision in both branches of the legislative assembly. If we award to the act of repeal the weight and power of a judgment of a court of record, or even of a justice of the peace, it will be readily admitted that it is not in the power of this or any other tribunal to collaterally question the validity of the act * * * However oppressive it may appear for a party to a contract to reserve the right of rescinding the same at pleasure, or upon the occurrence of events, of the existence of which he is to be the judge, yet that a party has a right to make such a reservation, will not be questioned. The members of the legislature are the agents of the public, and are presumed to have no personal interests to serve, other than what pertains to their constituents in common with themselves. They act in a fiduciary capacity, and are not amenable to the odium attached to a party who reserves the right of being a judge in his own case."

The constitution of the state of Delaware of 1832, article 2, section 17, reserved to the legislature the power to revoke charters. In the case of The Delaware Railroad Co. *vs.* Tharp, 5 Harrington, 456, the court said:

"It never could have been the purpose of the convention to reserve to the legislature a mere power to revoke charters from whim or caprice, and without any cause; such an idea would be fatal to all public improvement, through the action of corporations. No one would invest his money in a bank or railroad or canal, if his rights were constantly subject to be taken away without cause and it would be contrary to the first principles of justice, after men under the sanction of legislative charter, have invested their money in public improvements, to have their corporate powers withdrawn without cause. True, this provision of the constitution reserves to the legislature alone the right to judge whether the corporation has abused its powers, and thus to revoke charters, but the reasonable construction of the constitution is, that this shall be done upon examination and trial before the legislature, upon grounds stated.'

See also the constitution of the state of Maryland, 1850, article 3, section 47, which provides as follows:

"That corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes, and in cases where in the judgment of the legislature the object of the corporation can not be obtained under general laws. All laws and special acts in pursuance to this section may be altered from time to time, or repealed."

In the case of State *vs.* Northern Central Railway Co., 44 Md. 160, Judge Robinson, in delivering the opinion of the court, said:

"The object of this provision of the constitution of 1850 was to preserve to the state control over its contracts with corporations, and to prevent the grant of corporate powers beyond the interference of the legislature, should the public interests at any time require such interference. It constituted, therefore, a condition upon which every charter was granted and held, and qualified to that extent the contract between the state and the corporators. The appellee having derived its right under the act of 1854, when the constitution of 1850 was in force, and the exemption from taxation claimed being a part of such charter, the power of the legislature to repeal or revoke the immunity thus granted, is, we think, too clear to be questioned. The fact that no such right was reserved in the act of 1854, incorporating the appellee, can make no difference. The constitution is the supreme and controlling law, and under its provisions, the right to alter, amend, or repeal every charter granted by the legislature to a private corporation is reserved as fully as if such reservation had been made in the charter itself."

When the plaintiff in error was chartered as a banking corporation section 932 (Section 3, chapter 18), Wilson's Revised and Annotated Statutes, 1903, providing as follows: "Every grant of corporate power is subject to alteration, suspension or repeal, in the discretion of the legislature", was in force and effect, and except as amended or repugnant to our constitution is still in force in this state. Sec. 1, Schedule (Bunn's Ed. sec. 450), Oklahoma Constitution.

86 Section 47, article 9 (Bunn's Ed. sec. 262), Oklahoma Constitution, provides as follows:

"The legislature shall have power to alter, amend, annul, revoke, or repeal any charter of incorporation or franchise now existing and subject to be altered, amended, annulled, revoked, or repealed at the time of the adoption of this constitution, or that may be hereafter created, whenever in its opinion it may be injurious to the citizens of this state, in such manner, however, that no injustice shall be done to the incorporators."

The legislature are the sole and exclusive judges to determine whenever the exercise of the rights under such charter is injurious to the citizens of the state. It is to be amended or repealed in such a manner, however, that no injustice shall be done the incorporators. This is not a limitation upon the power of the legislature to alter, amend, annul, revoke, or repeal such charter, but a direction that such power shall be exercised in such a manner as not to work an injustice upon the stockholders. When the plaintiff corporation was chartered, the corporators assenting to the terms thereof, the charter was acquired with the full understanding that the legislature in its discretion could alter, suspend, or repeal the same. There is no allegation in plaintiff's complaint that prior to or since the ratification of our constitution there has been any change in the personnel or holdings of the shareholders, and when the corporators agreed that the legislature might alter, suspend or repeal said charter at pleasure, how can they be heard to complain now, that the legislature has seen

fit in the exercise of its discretion to amend said charter? Or that it was done in such a manner as to do them an injustice? Under the provisions of section 47, article 9, of the constitution, *supra,* the legislature whenever, in its opinion, a charter is injurious to the citizens of the state, should exercise its power to alter, amend, annul, revoke or repeal the same; but it is directed therein to provide
87 for the winding up or administering of the affairs of such corporation so as to protect, not only the creditors, but also the corporators.

Section 1 of chapter 4 of the Session Laws of 1899, as amended February 12, 1908, provides as follows:

"Any three or more persons, a majority of whom shall be residents of this state, may organize themselves into a banking association, and be incorporated as a bank, * * *; and provided further, that all banking institutions now organized as corporations, doing business in this state, are hereby permitted to continue said business as at present incorporated, but in all other respects, their business, and the manner of conducting the same, and the operation of said bank, shall be carried on subject to the law of this state, and in accordance therewith; * * *."

Counsel for plaintiff in error in their brief state:

"It is doubtless true, that such a law could be enforced as to banks chartered after its passage, because then it would be optionable with the persons desiring to organize a bank to incorporate or not, as they liked. If they chose to avail themselves of the law, they could not then object to it, but as to banks already in existence, that have no choice in the matter, the law does not operate upon them by their consent, but purports to compel them to act under its provisions."

Counsel overlook the fact that the law merely provides that "all banking institutions now organized as corporations, doing business in this state, are hereby permitted to continue as at present incorporated, but in all other respects, their business, and the manner of conducting the same, and the operation of said bank, shall be carried on subject to the laws of this state, and in accordance therewith". The legislature was authorized to unconditionally repeal such charter, and to make provision for the winding up of its affairs. It is not compulsory upon the stockholders to continue in the banking business. If they do not see proper to comply with the laws of the state, and to conduct the business of the bank in accordance therewith, it has the option to wind up its affairs, pay its depositors, settle with its creditors and stockholders, and discontinue business.

88 In 1862 the legislature of New York incorporated the North American Life Insurance Company, Which continued business until March 8th, 1877. For several years before the last date it had issued registered policies and annuity bonds, under the acts, chapter 576 of the laws of 1866, chapter 708 of the laws of 1867, and chapter 902 of the laws of 1869. There being registered and nonregistered policy holders, the claim was made, in the case of the Attorney General *vs.* North American Life Insurance Company, 82 N. Y. 182, that the three acts heretofore referred to, so far as they provided for a special fund for the security of the registered

policy holders, were unconstitutional, and therefore all of the funds of the company should be combined into one fund in which all the creditors of the company should share pro rata. Mr. Justice Earl, in delivering the opinion of the court in that case, said:

"It is also contended that the acts were in conflict with section 9 of article 7 of the constitution, which provides that 'the credit of the state shall not in any manner be given or loaned to, or in aid of any individual, association or corporation.' The answer to this contention is that the credit of the state was not given or loaned by these acts. It simply became the custodian of the securities deposited with it. It incurred or assumed no responsibility, except as a depository. Its responsibility was just like that assumed by the state under the Safety Fund Act (1 R. S. 2nd Ed. 606), and under the General Banking Law of 1838 (chap. 260), and under the General Insurance Law of 1853 (chap. 463), which require a deposit with the comptroller of securities to the amount of $100,000. It was never before supposed that the constitutional provisions cited was intended to prohibit the assumption by the state of the responsibility imposed by such acts.

It is further contended that the act of 1869 violates both the state and federal constitutions, in that its provisions deprive life insurance companies of their property without due process of law. This is plainly not so. Section 7 of that act provides that if at any time the affairs of any life insurance company which has deposited securities under the act shall, in the opinion of the superintendent of the insurance department, appear in such a condition as to render the issuing of additional policies and annuity bonds by such company injurious to the public interest, the superintendent shall report such fact to the Attorney General, whose duty it shall then be to apply to the Supreme Court for an order requiring the company to show cause why its business should not be closed. The court must, thereupon, proceed to hear the allegations and proof of the respective
89 parties, and, in case it shall appear to the satisfaction of the court that the assets and funds of the company are not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations, as authorized by its charter, then the court must issue an order enjoining and restraining the company from further prosecution of its business, and appoint a receiver of all the assets and credits of the company. *The legislature had the right to alter or repeal any law under which these companies were organized, and thus prescribe the conditions upon which their existence could be continued or terminated. It could terminate the existence of every insurance company in this state, without violating any constitutional provision.*"

Plaintiff in error, with its charter powers granted subject to alteration, suspension or repeal in the discretion of the legislature, without any qualifications,—and there is no allegation that there has been any change in the holding of shares since the adoption of the constitution,—insists that the clause "in such manner, however, that no injustice shall be done to the incorporators" is a limitation upon the exercise of the power of the legislature to alter, suspend or repeal its

charter, and cites the case of Vicksburg *vs.* Water Works Co., 202 U. S. 464, 50 L. Ed. 1102, wherein Mr. Justice Day, speaking for the court, said:

"Furthermore, the Mississippi constitution contains this provision, which is not in the Ohio constitution considered in the Hamilton case, namely, 'Provided, (in exercising the right of amendment or repeal of a charter) no injustice shall be done to the stockholders.' The words placed in brackets by the court are interpolative construction of that proviso. The clause in the Oklahoma constitution is, "that it shall be done in such a manner." The office of the proviso is that of limitation, and in the Mississippi constitution evidently the fair construction is that the legislature should have power to alter, amend or repeal any charter of incorporation then existing and revokable, and any thereafter granted, when in its opinion it may be to the public interest to do so, when such alteration, amendment, or repeal shall do no injustice to the stockholders. The
90 provision of the Oklahoma constitution does not limit the power, but regulates or directs the manner. The framers of the Oklahoma constitution, regarding public interests, lodged the power absolutely in the legislature to alter, amend, annul, revoke or repeal such charters. But at the same time, regardful of private rights, directed that the legislature should take such precautions in the manner of exercising that right as to work no injustice upon the corporators. Section 10, article 16, of the Pennsylvania constitution is practically identical with the provision of the Oklahoma constitution, and in construing that section in the Pennsylvania College Cases, *supra*, the Supreme Court of that state makes no intimation that the words therein used, "in such manner, however, that no injustice shall be done to the corporators," is a limitation upon the power of the legislature to exercise its discretion in determining whether or not it will alter, revoke, annul, amend or repeal any charter of incorporation. The court in that case said:

"Reservations in such a charter, it is admitted, may be made, and it is also conceded that where they exist the exercise of the power reserved by a subsequent legislature does not impair the obligation of a contract created by the original act of incorporation."

The business of banking, by reason of its intimate relation to the fiscal affairs of the people, is, and ever has been, considered a proper subject of legislative control, and strictly within the domain of the internal police power of the state. Such business is as essential and necessary to the conduct and carrying on of trade and commerce as are common carriers. Mr. Freund on Police Power, in section 450, says:

"When we examine the nature of the restrictions on the business of banking and insurance, we find that nearly all aim to the same object: The protection of depositors and insured from losses
91 resulting from insolvency of the bank or insurance company. This loss is to be averted by insisting upon some guaranty of financial stability. Provisions of this kind are not absolutely confined to banking and insurance; in some states railroad or other public service corporations may not issue securities without complying

with prescribed conditions, or without the consent of designated authorities; and the power of corporations to borrow money may be generally limited. But in the case of banking and insurance they are not necessarily confined to corporations, and by far exceed the financial regulations imposed upon any other kind of business. While all the provisions furnish protection against fraud, they do not intend to be limited to guarding against that danger, but plainly seek to prevent more improvidence or inadequacy of resources.

The justification of this must be found in the peculiar nature of the business regulated; both banks and insurance companies deal in their own credit, while they receive cash, and, in addition, banks and life insurance companies are the depositaries of a large proportion of the savings of the people, so that the management of each institution affects a considerable part of the public. These conditions create a special public danger, requiring a more incisive exercise of the police power than is called for in an ordinary business."

He further says in section 401:

"Banking and insurance being peculiarly affected with a public interest, it follows that the right to carry on either business may be made to depend upon the compliance with certain conditions; and a license may be required as evidence of compliance. In New York, in the case of savings banks and trust companies, the authorization is only given upon ascertaining that the general fitness of the organizers for the discharge of the duties appertaining to the trust is such as to command the confidence of the community, and that the public convenience and advantage will be promoted by such establishment."

In the case of Myers, *et al., vs.* Manhattan Bank, 20 Ohio, 295, Mr. Justice Ranney, speaking for the Supreme Court of that state, said:

"That the creation of a corporation is an exercise of sovereign legislative power."

And on page 303 he further states:

"Now it will not be doubted that it was competent for the legislature to have allowed all persons to bank, or to have prohibited all; or to do as they have done, allow all 'incorporated by a law of this state,' and prohibit all others. The policy of this legislation is perfectly obvious. They intended to guard the community against fraud and imposition, by exacting of persons engaging in this business the proper security before they were suffered to enter upon it, and to make them directly amenable for abuses, to our own laws."

92 The following authorities support the rule that the matter of regulating and prohibiting private banking, and all banking not expressly authorized by law, is within the discretion of the legislature, under that branch of the police power relating to public safety, and that the courts will not interfere and declare such legislation unconstitutional, as an invasion of public rights: People *vs.* Barton, 6 Cowen, 290; People *vs.* Utica Insurance Co., 15 Johns, 358, 8 Am. Dec. 243; People *vs.* Brewster, 4 Wend. 498; Pennington *vs.* Townsend, 7 Wend., 276; Hallett *vs.* [illegible]

246, 46 N. W. 970, 11 L. R. A. 420; Curtis *vs.* Leavitt, 15 N. Y. 9; State *vs.* Williams, 8 Tex. 255; Bristol *vs.* Barker, 14 Johns, 205; Louisville S. V. & T. Co. *vs.* Louisville & N. R. Co., Ky., 17 S. W. 557, 14 L. R. A. 579; Thorpe *vs.* Railroad Co, 27 Vt. 149; Baker *vs.* State, 54 Wis. 368; Myers, *et al., vs.* Manhattan Bank, 20 Ohio, 295; Cooley's Const. Lim., 7th Ed. pp. 555-556; Morse on Banking, 3rd Ed. sec. 13; Zane on Banks & Banking, secs. 7-15.

The only authority to the contrary is the case of State *vs.* Scougal, 3 So. Dak. 55, 51 N. W. 858, 15 L. R. A. 478. And that can not be considered as a case in point, as the decision is based upon section 18, article 6, of the constitution of the state of South Dakota, which provides:

"No law shall be passed granting to any citizen, class of citizens, or corporation, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

The provision in our constitution, section 51, article 5, (Bunn's Ed. sec. 124), reads as follows:

"The legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this state."

Ours is in effect that every association or corporation, and
93 any individual, may have any right that any other of the same class may have; while the South Dakota section prohibited the granting to a corporation what was not extended to an individual. We have searched with care, and this is the only case we have been able to find that has ever questioned the right of the legislature in exercising police power to regulate, restrain and govern the business of banking. It was for this purpose that the act relating to banks and banking was passed by the legislature of Oklahoma on the 10th day of March, A. D., 1899 (Session Laws, Oklahoma, 1899). Section 17 provides:

"It shall be unlawful for any individual, firm or corporation to transact a banking business, or to receive deposits, except by this act authorized. Any person violating the provisions of this act * * *."

This is substantially the same as the section construed by the Supreme Court of North Dakota, in the case of State, *ex rel.*, Goodsil, *vs.* Woodmansee, 1 N. Dak. 246, 11 L. R. A. 420, which provided as follows:

"It shall be unlawful for any individual, firm or corporation to continue to transact a banking business, or to receive deposits for a period longer than six months, immediately after the passage and approval of this act, without first having complied with and organized under the provisions of this act."

The act of the Oklahoma legislature of March 10, 1899, providing for the organization, management, control, regulation and supervision of banks, and providing penalties for the violation of the provisions thereof, is a very comprehensive one. Section 11 places double liability upon the stockholders; section 12, restrictions upon the business, in that it forbids the employment of the bank's funds in trade, by buying wares, etc., and investing in the stock of other banks, or making loans on its stock as security; section 13, which is practi-

cally the same as section 15 of the act of December 17, 1907, requires a reserve fund; section 14, likewise practically the same as
94 section 16 of the act of December 17, 1907, places a limit on the liability that any person, company, corporation or firm may incur to any bank; section 18 requires reports. The act of December 17, 1907, supplements the act of March 10, 1899, as amended by the legislature in the years 1903 and 1905. Section 12 thereof prescribes certain qualifications of directors; section 13 forbids any active managing officer from borrowing money from the bank under pains and penalties; section 18 lodges with the bank commissioner the authority and power to regulate and control banks, for the protection of the stockholders and depositors, and authorizes him to remove from office any dishonest, reckless or incompetent officer or employee. Section 1 creates a state banking board, composed of the Governor, Lieutenant Governor, President of the State Board of Agriculture, State Treasurer, and State Auditor. Section 2 provides for the creation of the Depositors' Guaranty Fund.

On February 12, 1908, section 1 of article 4 of the Session Laws of 1899, was amended so that the last proviso therein reads as follows:

"And provided further, that no bank, except those that have complied with, or that may be organized under the laws of this state relating to trust companies, shall engage in any business other than is authorized by this act."

The legislature of Oklahoma, in the exercise of its power, had the right to create corporations with reservations, and to make banking a franchise. And the state, through its constitution, permits the same power in its legislature, and continues such grants of corporate power as were made by the Oklahoma legislature, with the reservations therein.

The legislature of the state of Vermont, in the year 1831, passed a general banking law, by which a safety fund was created. It was provided that all banks chartered or rechartered at that, or any future session of the legislature, should be subject to the provisions
95 of that act. By section 2 it was provided that each bank should pay to the treasurer of the state three-fourths of one per cent on the capital stock paid in, annually; on the 3rd Tuesday of October. By section 4, that this should continue until each bank should have paid in four and one-half per cent on its capital stock, which should remain inviolably appropriated to the payment of the debts, exclusive of the capital stock, of any of the said banks which should become insolvent. By section 8, that if the funds should be reduced by the payment of the debts of any insolvent bank, every bank then existing which should be subject to that act, and every one thereafter chartered, should be assessed again by the treasurer, not exceeding the original rate, until the funds should be restored to four and one-half per cent, on the capital stock of said banks. Section 11 provided that if the funds in the treasurer's hands should be insufficient to pay the debts of any insolvent banks, the several solvent banks should be assessed according to section 8, until the fund should be sufficient to pay them, and then they should be paid. These

provisions were construed in the year 1851 in the case of Elwood, *et al., vs.* The Treasurer of Vermont, 23 Vt. 700, Book 8 Ann. Ed. 234, without the constitutionality of the act being questioned. Afterwards, in the year 1866, provisions relating to this safety fund were passed on by the Supreme Court of the state of Vermont, in the case of Receiver of Danby Bank *vs.* The State Treasurer, 39 Vt. 92, 12 Ann. Ed. 32, without the constitutionality of the act being questioned. So it evidently was assumed by all parties that the same was valid.

In the year 1829, the legislature of New York passed a safety fund law. By that act the banks were required to pay
96 into a safety fund to be held by the comptroller and treasurer, a tax on the capital stock at the rate of one-half per cent. per annum until the amount paid in was equal to the amount of three per cent. of their capital stock. They were allowed to issue notes to double the amount of their capital, whilst their loans could not exceed two and one-half times their capital. Finances and Currency Bill, p. 130, House Report 5629, 49th Congress. People *vs.* Walker, 17 N. Y. 502; Reciprocity Bank, 22 N. Y. 9, 29 Barb. 371. The appellate courts in New York construed the provisions of said act without the question of their constitutionality ever being raised.

The miser who hoards is not only looked on with disfavor in the pages of Holy Writ, but also in all the chronicles of civilized man. Development and progress are made, not with the talent buried, but with it in use. In the exercise of the police power for the protection of public interests and for public welfare, it is the duty of the government to provide every protection and safeguard against loss to depositors, that money, the circulating medium, may not be hoarded, but kept in circulation in order that there may be progress and prosperity and happiness. Section 1, article 14 (Bunn's Ed. sec. 315), Okla. Const., provides:

"General laws shall be enacted by the legislature providing for the creation of a Banking Department, to be under the control of a Bank Commissioner, * * * with sufficient power and authority to regulate and control all state banks, loan, trust and guaranty companies under laws which shall provide for the protection of depositors and individual stockholders."

The legislature having amended and supplemented the banking laws of the territory of Oklahoma, which were extended to and remained in force in the state by the provisions of the schedule to the constitution, after its admission into the Union, in accordance with the requirements of section 1, article 14, *supra*, the legislative
97 judgment in providing for the protection of depositors and individual stockholders should not be disturbed by the courts, and such law declared invalid, unless its repugnancy to the constitution appears beyond a reasonable doubt. Fletcher *vs.* Peck, 6 Cranch, 128; Higgins *vs.* Brown, 94 Pac. (Okla.) 703; City of Pond Creek, *et al., vs.* C. N. Haskell, *et al.*, — Pac. (Okla.)

In the case of State *vs.* Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A. (New Series), 874, the court said:

"It is charged that the provisions of section 2 forbidding more

than one-third of the capital of the bank to be invested in real estate, bank furniture and fixtures, for the conduct of the business of the bank, and the second and fifth subdivisions of section 3 of the statute, are invalid and unconstitutional. The right of banking in all of its departments, at common law belonged to the individual citizen, to be exercised at pleasure. It is conceded by counsel, and it is unquestionably settled, that the sovereign authority of the state may regulate and restrain the exercise of such right * * * The quasi public nature of the banking business, and the intimate relation which it bears to the fiscal affairs of the people and the revenues of the state, clearly bring it within the domain of the internal police power, and make it a subject for legislative control. Bankers invite general deposits primarily for their own profit, and usually obtain a measure of public patronage, and the expediency of guarding the people against imposition, extortion and fraud, of affording means of detecting irregular practices, and of learning the true financial condition of the bank, and the necessity of preserving the confidence of patrons in its solvency, and of protecting their interest in the case of insolvency, justify inspection and control by the state. When the sovereign people of a state, acting through the legislature, find such police regulation necessary to protect public health, safety, or morals, to prevent fraud or oppression, or to promote the general welfare, the power to act is supreme, subject only to such limitations as are imposed by the fundamental law. The question as to what regulations are proper and needful is primarily for legislative decision; yet, when the police power is used to regulate a business or occupation which in itself is lawful and useful to the community, the courts, if called upon, must determine finally whether such regulations as may have been prescribed are so far just and reasonable as to be in harmony with constitutional guaranties. Republic Iron & Steel Co. *v.* State, 160 Ind. 379, 385, 62 L. R. A. 136, 66 N. E. 1005.

Appellee's learned counsel frankly concede that the business of banking, whether conducted by a corporation or by individuals, is a legitimate subject of inspection and regulation by law under the police power; and further, that the provision of section 2 of the act under consideration making it unlawful to transact a banking business under this act on a capital of less than $10,000 in money, bank furniture, fixtures, and real estate, all to be set apart and kept good for the security of creditors of the bank, are wise and salu-
98 tary. They earnestly contend, however, that the proviso 'that the real estate, bank furniture and fixtures shall not constitute more than one-third in amount and value of the entire capital of such bank' contravenes the constitutional guaranty that 'No man's property shall be taken by law without just compensation' (Ind. Const. art. 1, sec. 21), since many private bankers already in business have bank furniture and fixtures and real estate of more than half, and in some cases nearly equal to, the value of the whole banking capital. It is further argued that this clause violates section 23 of the first article of the state constitution, which provides 'that the general assembly shall not grant to any citizen or class of citizens privileges and immunities which, upon the same terms, shall not

equally belong to all citizens,' inasmuch as it casts a burden of discriminating inequality upon established bankers having valuable banking houses and equipments; and finally, that it deprives such bankers of their property without due process of law, and abridges their privileges and immunities in contravention of the 14th amendment of the constitution of the United States. It was held in Aurora *v.* West, 9 Ind. 74, 83, that it is only the taking of specific pieces of private property by the exercise of the power of eminent domain, without compensation, that is prohibited by section 21, article 1, of the state constitution, and that might properly be taken by taxation for public purposes without any other compensation than the general and common benefits accruing from the expenditure of the fund thereby produced. It is equally clear that this constitutional provision was not intended to serve as a restraint upon the exercise of the police power of the state for the public welfare, by which a particular use of property, once lawful and unobjectionable, may be forbidden, or property be wholly destroyed, without compensation and without the consent of the owner.

The insistence that the act grants special privileges and immunities is equally untenable. It is manifest that in every regulating statute the precise terms prescribed must be to some extent arbitrary, depending upon the exercise of a sound legislative judgment. The constitutional mandate is satisfied if there be no manifest intent to discriminate in favor of a particular class of citizens to the exclusion of others similarly circumstanced, and the provisions of the restrictive act be in fact open alike to all citizens who may bring themselves within its terms. This act neither confers special privileges, nor makes unjust discriminations, but its privileges are open to every citizen upon the same terms. It denies no privilege to anyone, and operates alike upon all who may avail themselves of its benefits.

* * * * * * *

The circumstance that for a time may inflict hardship, inconvenience, and possibly loss to certain individuals does not amount to a constitutional objection so long as such burdens or losses are not needlessly and unreasonably imposed, but result as an incident to a general enactment fairly designed to subserve the public welfare. If the mere fact of resulting inconvenience and loss to an established business, admittedly subject to public control, were sufficient to preclude control under the police power, then regulation would be practically impossible, and this most salutary and necessary power of sovereignty be seriously abridged or wholly destroyed. This statute grants equal privileges, and imposes like restrictions upon all persons under the same circumstances, and does not deprive appellee of due process of law, or deny him equal protection of the law, in violation of the 14th amendment of the constitution of the
99 United States. * * *

The same constitutional objections are urged against the validity of section 3 of the act which requires the banker to make oath 'that the responsibility and net worth of the individual members of such firm, partnership, or individual is equal to an amount at least double the amount of capital paid into such bank.' It is

insisted that this clause prohibits a banker from using all of his capital in his business, and is an instance of arbitrary selection and of illegal discrimination. It is not correct to say that the banker is thereby prohibited from using all of his capital in his business. But he is forbidden from treating his entire holdings as capital stock, and in effect required to have and maintain a reserve or surplus fund. In considering this proposition it must be borne in mind that the banking business is not wholly private, but quasi public in character and subject to governmental supervision, and, in view of this fact, the arguments advanced appear more appropriate for legislative than for judicial consideration. This feature of the statute is not different in principle from the double liability of stockholders in incorporated banks, and, for the reasons already given, and upon the authorities cited, we are of opinion that it does not violate any of the constitutional principles relied upon by appellee."

Section 27 of article 12, of the constitution of Missouri, provides:

"It shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier, or other officer of any banking institution, to assent to the reception of deposits, or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent, or in failing circumstances; and any such officer, agent, or manager shall be individually responsible for such deposits so received, and all such debts so created with his consent."

Said constitution went into effect on November 30, 1875. The Central Savings Bank was created by a special charter in 1857, without any reservation as to amendment or repeal of the same. On March 2, 1876, the plaintiff in the case of Cummings *vs.* Spaunhorst, 5 Mo. App. 23, deposited with, and loaned to, said bank a certain sum of money, the bank soon thereafter failing. Suit was brought against the defendant therein as a stockholder, on the ground that he was individually responsible under said section 27 of article 12 of the constitution, *supra*. The court said:

"It is next claimed that the directors who are here sued accepted their positions and held them under a special charter, and can not be affected by a subsequent act which increases their liability.
100 It is claimed that this liability would impair the obligation of the contract between the bank and the state; but in what way, the defendants in error do not show. A certain act is forbidden, and a penalty is imposed upon certain persons who violate the prohibition; and instead of providing that the penalty shall go to the state, or that an informer may sue for and recover it, this clause incidentally affords a remedy to the injured party, as the old statutes often did to the party aggrieved. This has nothing to do with the franchise of the corporation; *but it would not matter if the corporation were incidentally affected. This corporation is subject, as are its officers, to the police power of the state, and the provisions of its charter can not exempt it from regulations made in the exercise of that power.* Thorpe *v.* Railroad Co., 27 Vt. 140; Peters *v.* Railroad Co., 23 Mo. 107; Cooley's Const. Lim., 3rd ed., 573. Nor need the regulations be any more distinctly made, in the exercise of the police power, than as indicating an intent to carry out a

policy which the state deems essential for the protection of rights in property; and regulations so made do not, because they incidentally affect it, impair the obligation of a contract. The — *v.* Matthews, 44 Me. 523; Price *v.* Insurance Co., 3 Mo. App., 262."

Banks are chartered by the state, not with the paramount view of enabling the stockholders to make investments and derive profits therefrom, but to meet a public necessity. The stockholders, having made investments therein, should be protected, but private interest must always be subordinated by the state, in the exercise of its police power, to the public welfare or good. With the view that the depositor, as well as the stockholder, and the general public with an incidental interest therein, may be protected, banking is regulated and limitations, restraints and requirements are imposed. The imposition of double liability upon the stockholders; the requirement of reserve funds; stipulations as to what capital stock can not be invested in; prescribed qualifications of the directors,—all these having been tried, in the judgment of the legislature the further restriction that active officers should not borrow from the bank without incurring pains and penalties, was deemed salutary. In addition, to further and more completely protect the depositors, the depositors' guaranty fund is created, the legislature acting pursuant to the
101 mandatory declaration of the constitution (Sec. 1, art. 14).

Because the sovereignty, in the exercise of its police powers, grants or permits franchises to banking corporations, at the same time providing for the protection of all deposits placed therein by creating a depositors' guaranty fund, banking corporations being compelled to pay in a certain stipulated and pro rated amount for the benefit of the depositors and for the public welfare,—it does not follow that such payments are made by such banks without reciprocal compensation or benefit. What are banks organized for? Are the officers and stockholders acting from a spirit of philanthropy in securing a charter and establishing such business? Or is it done for the purpose of gain? It being at the same time both necessary and convenient for persons engaged in business to deposit their money in the banks, and have the benefit of exchange, the banking corporation receiving, under certain limitations and regulations, the benefit of the use of the deposits, ofttimes without any compensation whatever to the depositor in the way of interest. In most instances the deposits subject to check bear no interest, and when the same are placed for a designated time, it is usually at a low rate, much lower than that at which the bank loans. True, the bank performs a valuable and a necessary service in every community, being a clearing house for the business concerns, and through its channels are furnished the ways and means for the financing of enterprises for the development of the country, the moving of crops, and the carrying on of all necessary business. The honest, reasonable, just, law-respecting banker bears a very necessary, and commendable relation to the community, town or city in which he is located.

When contracts are made certain confidence is assured in business transactions. When deposits are made safe confidence in
102 the banks is assured. Then whatever protects the depositor protects the bank, because it assures confidence in the bank.

And with the bank restricted in its operations by a rigid requirement of the law: Careful inspection; frequent reports; ample reserve fund to be retained; limitation on the amount that may be loaned; no loan to be made to an active officer therein without criminal punishment being incurred; restrictions as to what the funds of the bank may be invested in,—all of these limitations and safeguards thrown around the banking world should justify banks in having confidence in one another. Each bank having a reciprocal interest in the depositors' guaranty fund, thereby each has an incidental reciprocal interest in every other bank. The banker can no more properly be permitted to say in regard to other banks, "Am I my brother's keeper?" than could the man in Holy Writ in the days of old, in the sight of Jehovah, repeat with approval such a subterfuge; for under this law each banker is his brother banker's keeper, he having an individual interest in the result of the management of each bank.

The national, state, county, municipal and district governments, as a rule, require security for deposits. Why may not the same power be exercised to require the guaranty of the deposits of individuals? The national, state, county, municipal and district governments prescribe how their deposits shall be secured. Why should not the government, in the exercise of the same power, prescribe how the banks shall guarantee or secure the deposits of the citizens of the state?

With the law enforced the reckless, dishonest and incompetent banker can not remain in business. The law closes the door of hope against him. For the pro rata amount each bank is required to deposit with the banking board to constitute the guaranty
103 fund, every one gets a reciprocal benefit therefrom. For every dollar that a bank is compelled to pay into such fund it receives a reciprocal protection and benefit, not only for itself, but also for its depositors; for what secures the depositor is certainly a benefit to the bank. It may not be so apparent in times of universal prosperity and contentment, but in the eras of depression and discontent the bank that has the assured confidence of its depositors should certainly be regarded as benefitted, for there is no danger of any general and unnecessary withdrawal of deposits from such bank. The bank that can rest assured against such contingencies thereby receives a benefit. Consequently, the guaranteeing of deposits occasions, not only assurance to the depositor, but relief to the bank from any apprehension of any unnecessary run upon and withdrawals from the bank. Whilst such assessment for the guaranty fund goes to the protection of every other bank, as well as its own, yet every bank receives a reciprocal benefit for its pro rata assessment paid into such fund, and thereby there is an equal reciprocal benefit to every bank in the state.

The presumption is that the bank commissioner will efficiently administer the laws of his department, and with that law enforced there can be no banks whose assets will not pay their liabilities. The brand of insolvency will be placed upon none, except as a result of defalcation or acts of Providence, occasioned by the seasons, the rains

and drouths and pestilences. And there should be enough of
104 the milk of human kindness in the soul of every man, whether he be banker, money lender, farmer or laborer, that he should take pleasure in participating in the reimbursement of losses occasioned by such misfortune. Mutual insurance companies, both life and fire, are based upon this business and humane proposition, and upon the eternal principles of right as written, not only in the sacred pages by the divine hand, but at one time or another impressed upon the heart of every human being.

Counsel for plaintiff in error neither make any contention or attempt to show, that the annual profits of this bank will not exceed any reasonable estimated assessment to be made by the banking board for said depositors' guaranty fund, nor that such assessment or assessments will prevent the bank from earning a reasonable annual dividend; but cite authorities to support their contention that this assessment amounts to a confiscation. Said authorities relate to charges prescribed for a service to be performed by such as public service corporations, stock yards, and the like, said charges having been fixed by commissions or by the legislature, and the question involved in such cases was whether or not the fixed charges amounted to a confiscation, on the contention that the service could not be performed except at a loss, and without any return upon the investment. Here the state has imposed conditions under which new banks could be organized and engage in the banking business, and also under which old banks could continue such business. One of the conditions is that they provide, in a designated way, for the guaranteeing of the deposits of the people that place money in such banks. The state at the same time having adopted rigid safeguards to preserve, not only the capital stock, but the deposits in each bank, with a view of protecting the individual stockholders of every bank in the state.
105 Where can this be any confiscation of any rights acquired under any bank charter, there being no contention made that the reasonable estimated assessments will be so large as to prevent the bank annually from earning a sufficient amount to pay this assessment, and also a reasonable dividend?

It is further asserted that national banks can neither guarantee the debts of other persons or corporations, nor become accommodation endorsers, and for that reason the section permitting national banks to avail themselves of the privileges of the protection of this depositors' guaranty fund law permits an injustice against the state banks, as the national banks which might avail themselves of the benefit of the law could, if they desire, repudiate the contract as *ultra vires*, and refuse to continue to pay their assessments, thereby endangering the assessment fund paid pro rata by the state banks, in the event of the failure of national banks which have availed themselves of the privileges of said law. Concede that such a contract is *ultra vires* as to national banks. That does not render the law invalid as to state banks. If the contract of the banking board is not binding upon the national banks, the converse of the proposition is also true, that it is not binding upon the state banking board. Neither party could obtain any independent benefit under a void law or statute. At

most, all the national bank could recover, in such event, would be the money paid under the same in good faith, when not against public policy.

In section 12 of plaintiff's complaint it is alleged that the depositors' guaranty act is in conflict with section 57, article 5 (Bunn's Ed. sec. 130), Okla. Const., which provides that "every act of the legislature shall embrace but one subject, which shall be clearly expressed in its title, * * *" This question is neither preserved in
106 this court by any assignment of error, nor is the same urged in any way in the brief of plaintiff in error, and under our rules the same is waived. At any event, it seems to be without merit. Lindsay *vs.* United States Savings & Loan Association, 120 Ala. 156, 24 So. 171.

Another question arising is whether or not the petition of plaintiff in error states facts sufficient to entitle it to the equitable relief prayed for. That portion of the petition upon which they rely to entitle them to relief by injuction, is as follows:

"And the plaintiff states that the said state banking board, acting under and pursuant to the pretended authority of said law, has levied an assessment against the capital stock of this plaintiff bank of one per cent. of its daily average deposits during the preceding year, which said average deposit amount to thirty-three thousand one hundred and forty-seven dollars ($33,147.00), and that the said state banking board and the said bank commissioner under and pursuant to said pretended law, proposes to compel this plaintiff to pay said one per cent. of its daily average deposits for the preceding year for the purposes of creating said depositors' guaranty fund for the benefit of the depositors of all of the banks in said state upon which said law operates, and that the said defendants, unless restrained by this court, will force this plaintiff to pay said assessment as provided by said pretended law, a copy of the said notice of assessment served on plaintiff is hereto attached, marked 'Exhibit D' and referred to as a part of this petition."

It is nowhere alleged therein how the defendants in error intend to compel the plaintiff in error to pay said assessment. There is no attempt made to plead the facts and circumstances to show how plaintiff in error will be compelled to pay said assessment, and that in attempting to compel the payment thereof the plaintiff in error will sustain irreparable injury. "The plaintiff should set forth in a brief but clear manner all the facts and circumstances out of which the principle of equity arise upon which he asks relief. It is a well settled rule of pleading that bare allegations of conclusions can not avail the pleader, especially where demurrer is interposed,
107 without a statement of the probative facts upon which his conclusions are based; and even when the facts are alleged, the averment of the pleader's conclusions may often be stricken out upon motion as irrelevant and redundant. Because of the harshness of the remedy by injunction, strict adherence to this rule of pleading is required in a suit for an injunction." 10 Enc. Plead. & Prac. p. 925, and authorities cited in foot note 1. "It is insufficient to allege merely that the plaintiff will suffer injury, however grievous or

intolerable such injury may be, without averring that the injury apprehended is irreparable." 10 Enc. Plead. & Prac. p. 951, and authorities cited in foot note 1.

We conclude that the act complained of is neither repugnant to the constitution of Oklahoma, nor that of the Federal government. And further, that the allegations in plaintiff's petition did not state facts sufficient to justify equitable interference, and the issuance of the writ of injunction prayed for properly denied.

The judgment of the lower court is affirmed.

All the justices concur.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the opinion in the above entitled cause, as the same remains on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 21st day of September, 1908.

[Seal Supreme Court State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court.
By W. M. BONNER, *Deputy.*

108 Supreme Court of the State of Oklahoma.

Clerk's Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, by virtue of the foregoing writ of error and in obedience thereto, certify that the foregoing pages, numbered from One to 107, both inclusive, contain a full, true and correct transcript of the record, proceedings, and pleadings had in said court in the case of the Noble State Bank, a corporation, *vs.* C. N. Haskell, G. E. Bellamy, J. P. Connors, J. A. Menefee, M. E. Trapp, and H. H. Smock, as the same remain of record and on file in said office.

In witness whereof, I have hereunto set my hand and cause my official seal as clerk of said court to be affixed, this 21st day of September, 1908.

[Seal Supreme Court State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma,
By W. M. BONNER, *Deputy.*

Endorsed on cover. File No. 21,340. Oklahoma Supreme Court. Term No. 544. The Noble State Bank, plaintiff in error, *vs.* C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee, M. E. Trapp, and H. H. Smock. Filed September 28th, 1908. File No. 21,340.